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Mediation as a Catalyst for Judicial Reform in Latin America

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Systemic corruption and inefficiency within many judicial systems of Latin America, coupled with violence and unlawfulness from these countries, have resulted in increasing public disfranchisement toward those systems and government in general. Vigorous judicial reform efforts are essential for addressing these multifaceted problems, and are currently being proposed by academics, governmental officials, nongovernmental organizations (NGOs) and public interest groups both within and without Latin America. The thesis of this article is that efficient and effective mediation programs should be an integral part of any reform effort for two reasons. First, mediation helps parties circumvent corrupt officials and can reduce inefficiency in the judicial system. Second, mediation programs can foster more participatory societies by educating and changing societal modes of communication and methods of resolving disputes.

Part II of the article provides an overview of the violence and unrest in Latin America, while Part III discusses the inability of the current judicial systems to stay that violence and unrest. Part IV examines the prospect of mediation as a tool of judicial reform, analyzing mediation as an alternative mechanisms to traditional litigation and as a means for societal education and encouragement of democratic means of problem-solving.

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Part IV also provides descriptions of actual mediation programs in place in Argentina, Bolivia, Ecuador, Nicaragua, and Peru. Many of the laws and programs are strikingly similar to American models, yet some are uniquely Latin American, such as Bolivia's sponsorship tradition and the Justice of the Peace programs in Peru. Finally, Part V calls for the establishment of various forms of mediation programs to address the problems of judicial corruption, systemic societal violence, and public disenfranchisement with government. In countries with a history of abuse of political power and disincentives for public participation in the resolution of important decisions, mediation offers a process in which individuals take back a measure of control over his or her own destiny.

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I. INTRODUCTION

Systemic corruption and inefficiency in many judicial systems of Latin America have resulted in widespread public mistrust and unrest. Violence and unlawfulness continue unchecked by any rule of law, while public disenfranchisement towards judicial systems and government in general increases daily. Judicial reform is one step toward decreasing this violence and unlawfulness, as well as one step toward the reinvention of democratic governance. Democracy in this sense is not the American definition, which "focuses on the formal institutions and elections, [but] emphasize[s] instead the need to incorporate the 'democratization of social and economic conditions.'"¹ It is, instead, a form of government that embraces public participation at all levels.

The thesis of this article is that efficient and effective mediation programs established by the government should be an integral part of any judicial reform effort. Specifically, in addition to helping parties circumvent corrupt officials and aiding in the reduction of inefficiency in the judicial system, mediation programs can address violence and unlawfulness in society. Essentially, mediation programs can foster a more participatory or democratic society by educating and changing peoples' modes of communication or methods of resolving disputes. Mediation does this not by suppressing conflict, but by encouraging the people involved to look upon conflict as an opportunity to improve not only their particular situation, but interactions within their families, their communities, and society as a whole.

Part II provides an overview of the violence and unrest in Latin America, while Part III discusses the inability of the current judicial systems to stay that violence and unrest. After setting up the problems regarding societal violence and the judiciary's inability to channel that energy into constructive

¹ DAVID R. MARES, LATIN AMERICAN PERSPECTIVES ON THE CAUSES, PREVENTION AND RESOLUTION OF DEADLY INTRA- AND INTERSTATE CONFLICTS, 1982-1996 executive summary (quoting Rosario Green, *Nuevas Formas de Concertación regional en América Latina: El Grupo de los Ocho*, INFORME ANNUAL RIAL (1988)), available at <http://wwics.si.edu/subsites/ccpdc/pubs/mares/mrfr.htm> (last visited Oct. 21, 1999).

and democratic avenues, Part IV examines the prospect of mediation as a tool of judicial reform. Subpart A analyzes the theory of mediation as a tool to provide alternative mechanisms to traditional litigation and as a means for societal education and encouragement of democratic means of problem-solving. Subpart B provides descriptions of actual mediation programs in place in Argentina, Bolivia, Ecuador, Nicaragua, and Peru. Finally, Part V concludes by encouraging Latin American governments to establish various forms of mediation programs to address the problems of judicial corruption and systemic societal violence.

II. VIOLENCE, UNREST AND AMNESTY LAWS

Latin American societies experience profound and disturbing levels of violence from both governmental bodies and private vigilante groups. For example, human rights nongovernmental organizations and the United States State Department have documented "grave abuses, including extrajudicial killings, torture, and arbitrary arrests."² Women, children, and indigenous peoples of Latin America are particularly at risk, and are "subject to violence, harassment, and discrimination."³ Prison conditions often include torture, and police abuses in general are rampant throughout the region.⁴

As further proof of the disparity between the persecuted and powerful of Latin America, the countries of Argentina, Brazil, Chile, Guatemala, Honduras, Peru, El Salvador, and Uruguay have recently passed amnesty statutes for governmental officials responsible for these abuses "in the name of national reconciliation."⁵ These statutes compound the problems and cause further estrangement between the persecuted and their governments.⁶ In essence, these amnesty statutes perpetuate governmental silence regarding human rights abuses, and may actually serve to increase public mistrust of government and inhibit the establishment of true participatory democracies. This public mistrust is widespread throughout Latin America and is described in Section III. A.

² *Special Report: Human Rights Still a Serious Problem in South America Despite Democratic Rule*, NOTISUR-LATIN AM. POL. AFFAIRS, Feb. 14, 1997, 1997 WL 8654691.

³ *Id.*

⁴ *See id.*

⁵ *See* United Nations Human Rights Committee, NGOs DECRY IMPUNITY FOR PERPETRATORS OF DISAPPEARANCES AND KILLINGS; CALL FOR AN END TO TORTURE, Apr. 4, 1996, available at <http://www.unep.org/restrict/dpi/presrel/prs04-04.009>.

⁶ *Id.*

As can be expected, Latin Americans run the gamut on the issue of "national reconciliation." For instance, Costa Rican ex-President and Nobel Prize winner Oscar Arias Sanchez has said "it is still necessary for the Latin American family to attain reconciliation, but not at the expense of pardoning all of the crimes of those who committed them."⁷ In contrast, Uruguayan President Julio Maria Sanguinetti has declared "we've pardoned terrorists, who had some responsibility for the violations of human rights, so it is natural to have amnestied the military as well."⁸ However, according to families of the victims of General Pinochet's bloody regime in Chile, "no healthy, solid, stable democracy can build itself upon a foundation of forgetting the most serious crimes against the right to life, integrity and freedom."⁹ In other words, while "disclosure of the truth is [only] part of ensuring that justice will be done," it is a necessary and integral requirement of a democratic society.¹⁰

When analyzing the causes of violence in conflict in Latin America, scholars generally agree that the extreme poverty and marginalization of much of Latin American society can produce both systemic and sustained violence, as well as "sporadic and spontaneous but extremely violent uprisings."¹¹ These analysts posit that this violence emerges not only under authoritarian governments, but also under "democratic systems that fail to provide opportunities for social, economic, and political participation."¹²

However, poverty and marginalization are not the sole causes of violence. At a micro level, familial relationships and community institutions that once worked to prevent and resolve conflicts are in the process of being

⁷ MARES, *supra* note 1 (quoting Oscar Arias Sanchez, *El Mundo Despues de la Guerra Fria: Los Principales Retos, PAZ Y SEGURIDAD EN LAS AMERICAS* Dec. 9, 1996).

⁸ *Id.* (quoting Julio Maria Sanguinetti, in *Un entretien avec le President Sanguinetti*, LE MONDE, Nov. 3-4, 1984, (cited in CHARLES GUY GILLESPIE, *NEGOTIATING DEMOCRACY* 219-21, 248 (1991)).

⁹ Remember-Chile: General Pinochet and Human Rights Abuses, *Statement by the Group of Families of the Detained and Disappeared*, July 23 1995, quoted in AMNESTY INTERNATIONAL, *TRANSITION AT THE CROSSROADS: HUMAN RIGHTS VIOLATIONS UNDER PINOCHET REMAIN THE CRUX* (March 1996), available at <http://www.remember-chile.org.uk>.

¹⁰ Remember-Chile: General Pinochet and Human Rights Abuses, Jorge Mera, *Chile: Truth and Justice Under the Democratic Government*, in NAOMI ROHT-ARRIAZA ED., *IMPUNITY AND HUMAN RIGHTS IN INTERNATIONAL LAW AND PRACTICE* 179 (1995), available at <http://www.remember-chile.org.uk> (last modified Apr. 27, 2000).

¹¹ MARES, *supra* note 1, at executive summary.

¹² *Id.*

destroyed through modernization.¹³ For example, “the destruction of extended family structures, the rural-urban migration, [and] the diaspora of indigenous communities” exacerbate the inability of families and communities to resolve their own problems and conflicts.¹⁴ In the process of urbanization, “the sense of solidarity and mutual responsibility within families, neighborhoods, and communities is lost.”¹⁵ Without that sense of solidarity and mutual responsibility, people involved in conflicts are less likely to work at resolving their problems, and more likely to resort to unconstructive forms of dispute resolution. For example, life in villages is much more interdependent than urban life, so that the risks of having a neighbor one barely knows at odds with you are just not as significant as being at odds with a neighbor your own family has known for years.

Moreover, most Latin Americans are more familiar with authoritative regimes in which officials make decisions for them¹⁶ than with participatory forms of government in which citizens may make their wishes known in a legitimate and systematic manner. The vast majority of citizens may not have agreed with those official decisions under dictatorships or military rule, but politically and socially they were powerless to make the decisions themselves. In other words, the decades of authoritarian regimes of the 1970’s and 1980’s¹⁷ often prevented the establishment and integration of popular decision-making at all levels, from familial and societal to political. When people are prevented from making their own decisions and resolving their own problems, they are similarly prevented from learning and using constructive forms of conflict resolution, and healthy change in society is impossible.¹⁸

¹³ See Jorge Correa Sutil, *Modernization, Democratization and Judicial Systems*, in JUSTICE DELAYED: JUDICIAL REFORM IN LATIN AMERICA 97, 102 (Edmundo Jarquín & Fernando Carrillo eds., 1998).

¹⁴ *Id.* at 102.

¹⁵ See Hans-Jürgen Brandt, *The Justice of the Peace as an Alternative: Experiences with Conciliation in Peru*, in JUDICIAL REFORM IN LATIN AMERICAN AND THE CARIBBEAN 92, 96 (Malcolm Rowat et al. eds.) World Bank Technical Paper No. 280 (1995).

¹⁶ See Dr. José María Cier, President of Libra Foundation. 1 ENCUESTO INTERAMERICANO SOBRE RESOLUCIÓN ALTERNATIVA DE DISPUTAS 12 (1993).

¹⁷ See Maria Luisa Bartolomei, *The Globalization Process of Human Rights in Latin America Versus Economic, Social and Cultural Diversity*, 25 INT’L J. LEGAL INFO. 156, 163 (1997).

¹⁸ See Camilo A. Azcarate, *Psychosocial Dynamics of the Armed Conflict in Colombia*, ONLINE JOURNAL OF PEACE AND CONFLICT RESOLUTION 2.1 (March 1999),

Although participatory governments are emerging, structural change from authoritarianism to more participatory, but not always stable, forms of government does not necessarily translate into systemic social change, especially when the newer forms of government permit corruption to continue. This disenfranchisement of the vast majority of citizens, both current and historical, has often led to violence. For our purposes, violence in Latin America can be separated into two broad categories: governmental violence in the form of human rights abuses; and reactionary violence by society in response to those abuses. While certainly not comprehensive, the following sections provide an introduction to these abuses and acts of violence in various countries of Latin America.

A. Argentina

Argentina maintained over twenty years of silence with regard to its “dirty war” between 1976 and 1983, in which “more than 10,000 people [were] kidnapped by security forces and disappeared, presumably killed, in addition to the 4,000 confirmed dead.”¹⁹ Amnesty laws of 1986 and 1987 set a sixty-day statute of limitations and established an irrefutable presumption that a member of the state services, excluding the highest level commanders, cannot be held independently liable.²⁰

Demands from an Argentine “federal court, human rights groups, politicians, clergy, and even the repentant torturers and killers” failed to motivate the government to break the silence.²¹ Finally, in 1994 General Martin Balza, the head of the Argentine Army, admitted to acting outside of the law.²² Although several other military commanders spoke of similar “excesses,” Balza was denounced by the military and called “a crook” by

available at http://www.trinstitute.org/ojpcr/toc2_1.htm. Mr. Azcarate is the Government Programs Coordinator in the Massachusetts Office of Dispute Resolution.

¹⁹ *Argentina: Military Apologizes for Abuses During Dirty War, Catholic Church Follows Suit*, NOTISUR-LATIN AM. POL. AFFAIRS, May 5, 1995, available at 1995 WL 2370073. Note: The National Commission on the Disappeared, established in 1983 by then-President Raul Alfonsin, officially held this number to be 9,000. See United States Institute of Peace, *Truth Commissions Digital Collection*, available at <http://www.usip.org/library/truth.html> (last updated Aug. 27, 1999).

²⁰ See William W. Burke-White, *Reframing Impunity: Applying Liberal International Law Theory to an Analysis of Amnesty Legislation*, 42 HARV. INT’L L.J. 467, 491–92 (2001).

²¹ *Id.*

²² See *id.*

Argentina's then-President Carlos Saul Menem.²³ Earlier, President Menem had specifically praised the military's activities, calling on Congress to promote two naval captains who were self-professed torturers and "'not to look back' at the bloody repression of the past, but to get on with healing wounds and unifying the country."²⁴

By 1996,

confessions by certain perpetrators had finally led the armed forces to admit some responsibility. Hundreds of children, the babies originally of people killed in the years of terror, had been farmed out as war booty to perpetrators of the crimes, and to others [not considered subversive]. The rightful grandparents had no knowledge of where these children were now, and the children themselves had lost their own identities.²⁵

In a claim brought by the Grandmothers of Plaza de Mayo (Abuelas de Plaza de Mayo), two hundred children were alleged to have been kidnapped, including infants born in a military hospital.²⁶ Unfortunately, although the kidnapping and disappearance of minors is specifically excluded from the amnesty laws, the irrefutable presumption against liability alluded to earlier nonetheless makes claims such as these extremely difficult to prosecute.²⁷

As of 2000, ten retired officers of the armed forces had been placed under house arrest in connection with the alleged kidnappings.²⁸ While the armed forces publicly acquiesced with the prosecution of retired officers in connection with the kidnappings, they expressed concern with officers on active duty providing testimony or information to the courts. Army Chief Lt. General Ricardo Brinzoni proposed instead a "reconciliation panel" involving the army, human rights groups, and the Catholic Church that would

²³ *Id.*

²⁴ *Argentina: President's Praise of Military Invokes Fury of Human Rights Groups*, NOTISUR-LATIN AM. POL. AFFAIRS, Nov. 11, 1994, available at 1994 WL 2244209.

²⁵ United Nations Human Rights Committee, *NGOS DECRY IMPUNITY FOR PERPETRATORS OF DISAPPEARANCES AND KILLINGS; CALL FOR AN END TO TORTURE*, Apr. 4, 1996, available at <http://www.unep.org/restrict/dpi/presrel/prs04-04.009>; Human Rights Watch World Report 2001, *Human Rights Developments: Argentina*, available at <http://www.org/wr2k1/americas/argentina.html> (last visited Sep. 28, 2001).

²⁶ See Human Rights Watch World Report 2001, *Human Rights Developments: Argentina*, available at <http://www.org/wr2k1/americas/argentina.html> (last visited Sep. 28, 2001).

²⁷ See Burke-White, *supra* note 20, at 492.

²⁸ See *id.*

attempt to determine the fate of these children without resort to the courts.²⁹ This idea drew governmental support, but it was abandoned when human rights organizations rejected it outright.³⁰

Argentina currently suffers extreme police brutality and violence. Minors, alleged criminals, homosexuals, and transvestites are the targets of this brutality, with eleven men proving they had been tortured and killed while detained by the police in 2000 alone.³¹ In addition, allegations of beating of minors by the police reached a total of 159 cases in the first seven months of 2000.³² Despite these statistics, investigations and prosecutions of the police are sporadic.³³

B. Bolivia

In Bolivia, eighteen military dictatorships from 1965 to 1982 resulted in the assassination, torture, and disappearance of numerous people.³⁴ Established in 1982 by then-President Hernán Siles Suazo, the National Commission of Inquiry into Disappearances documented 155 cases of disappearances during this period.³⁵ Various truth commissions also state the regimes' tactics resulted in the killing of 76 persons, the forced exile of more than 6,000, illegal detention and often torture of 14,000, and infliction of serious bodily injury to 204.³⁶ Recently, conflicts between the "government and coca growers . . . have led to grave abuses by the government against campesino [farm worker] activists."³⁷ Specifically, detainees were forcibly transported to "remote jungle and highlands areas" and housed in inadequate shelter, thus exposing them to a "high-risk of illness."³⁸ In addition, human

²⁹ See *id.* Perhaps in response to public sentiment for the plaintiffs, the Supreme Court of Argentina has refused a petition of the Supreme Council of the Armed Forces to transfer the case to military courts. See *id.*

³⁰ See *id.*

³¹ See *id.*

³² See *id.*

³³ See *id.*

³⁴ See Esteban Cuya, *Las Comisiones de la Verdad en America Latina*, available at <http://www.derechos.org/koaga/iii/1/cuya.html> (last visited Jan. 27, 2003).

³⁵ See United States Institute of Peace, *Truth Commissions Digital Collection*, available at <http://www.usip.org/library/truth.html> (last updated Oct. 4, 2002).

³⁶ See Cuya, *supra* note 34.

³⁷ *Special report*, *supra* note 2.

³⁸ *Bolivia: Strikes End, But State of Siege Continues*, NOTISUR-LATIN AM. POL. AFFAIRS, May 12, 1995, available at 1995 WL 2370077.

rights organizations point to the “kidnapping and torture by security forces of Waldo Albarracin, president of the Asamblea Permanente de Derechos Humanos de Bolivia” (Permanent Assembly of Human Rights of Bolivia) as a chilling reminder of the relationship between Bolivian officials and human rights organizations.³⁹

Finally, in 1995, in response to demonstrations by labor unions, teachers, and campesinos (farm workers), the government called a 90-day state of siege that prohibited all union and collective activity, “forbid[ing] citizens [from] carry[ing] weapons, impose[d] a curfew, and allow[ed] the government to detain people without charges.”⁴⁰ According to labor union Central Obrera Boliviana executive secretary, Oscar Salas Moya, who had been imprisoned during the siege, the Bolivian government’s response to the demonstrations and their mass detention of union members showed that the government “does not know how to live in a democracy, and prefers a dictatorship.”⁴¹

C. Brazil

Two hundred deaths attributable to Brazil’s military regime (in power from 1964 to 1985) have been reported.⁴² Governmental torture was widespread during the regime, and included “near-drowning, electric shocks to sensitive areas of the body, exposure to extreme heat or cold, and severe beatings during extended periods of interrogation.”⁴³ Kidnapping intended suspects was not uncommon.⁴⁴

Although Brazil became a democracy in 1985,⁴⁵ governmental violence has continued. In conflicts between twelve million landless campesinos and

³⁹ *Special Report*, *supra* note 2.

⁴⁰ *Bolivia: Strikes End*, *supra* note 38.

⁴¹ *Id.*

⁴² See Dawn Bennett-Ingold, *Latin American Democracy: Flourishing or Floundering?* 28 GA. J. INT’L & COMP. L. 111, 111 (1999); see also Roseann M. Latore, *Coming Out of the Dark: Achieving Justice for Victims of Human Rights Violations by South American Military Regimes*, 25 B. C. INT’L & COMP. L. REV. 419, 424–25 (2002).

⁴³ Andrew Lee, Book Annotations, *Archdiocese of Sao Paulo, Torture in Brazil: A Shocking Report on the Pervasive use of Torture by Brazilian Military Governments, 1964–1979*, 31 N.Y.U. J. INT’L L. & POL. 185, 186 (1998).

⁴⁴ See *id.* at 189.

⁴⁵ See Andrea Steuer Zago & Lionel Pimentel Nobre, *The Brazilian Citizen Constitution, The Environment and Taxation*, 20 LOY. L.A. INT’L & COMP. L. REV. 507, 507 (1998).

landowners between 1986 and 1996, approximately one thousand campesinos were killed by either police or private paramilitary groups hired by landowners.⁴⁶ In a particularly grisly police confrontation in 1996, twenty-three campesinos were killed either execution style at point-blank range or beaten to death, while fifty more were injured.⁴⁷ An internal police investigation found the police guilty only of "lack of discipline," and placed the responsibility for the massacre on the surviving campesinos.⁴⁸ In 2000, "police prevented buses carrying hundreds of [unarmed] landless workers from entering Curitiba, capital of Paraná state."⁴⁹ The officers "hurled tear gas canisters and fired rubber bullets into the crowd," injuring two hundred and killing one person with a live bullet.⁵⁰ The inability to hold police accountable for these atrocities is twofold: human rights violations currently are heard in politically corrupt state courts and police violations are heard in internal tribunals "which rarely punish officers for rights abuses."⁵¹ According to the Catholic Comissão Pastoral da Terra, of these murders, "only 47 cases made it to court and, of those, only five led to a conviction."⁵²

Highlighting these conflicts are the economic realities of rural Brazil. For example, large farms comprised 55.2 percent of all rural property in 1996, and were owned by 2 percent of all landowners.⁵³ While these farms "only produce[d] 11 [percent] of the food consumed in the country, they receive[d] 80 [percent] of the rural bank credit."⁵⁴

Violence in Brazil is not limited to rural conflicts. For example, urban police in Sao Paulo were estimated to be responsible for the deaths of more

⁴⁶ See *Brazil: Police Massacre of Landless Campesinos Shocks Nation*, NOTISUR-LATIN AM. POL. AFFAIRS, Apr. 26, 1996, available at 1996 WL 8089389.

⁴⁷ See *id.* Leaders of the labor group Movimento dos Trabalhadores Sem-Terra confirmed the above numbers; however, official sources put the number of deaths at nineteen. *Id.*

⁴⁸ *Brazil: Capture of "Chico" Mendes's Killer Highlights Rural Violence*, NOTISUR-LATIN AM. POL. AFFAIRS, Aug. 2, 1996, available at 1996 WL 8089421 [hereinafter *Brazil: Capture*].

⁴⁹ See Human Rights Watch World Report 2001, *Human Rights Developments: Brazil*, available at <http://www.hrw.org/wr2k1/americas/brazil.html> (last visited Mar. 13, 2003).

⁵⁰ *Id.*

⁵¹ *Brazil: Police Massacre*, *supra* note 46.

⁵² *Brazil: Capture*, *supra* note 48.

⁵³ See *id.*

⁵⁴ *Id.*

than 1,000 people each year in 1991 and 1992.⁵⁵ In the state of São Paulo alone, police are reported to have killed 525 civilians in 1998, 664 in 1999, and 489 in the first six months of 2000.⁵⁶ Analysis of autopsy reports of 222 victims killed by gunfire in 1999 revealed that fifty-one percent had been shot in the back while twenty-three percent had been shot five or more times, suggesting that the killings were not the result of a legitimate use of force during shootouts, as Brazilian authorities routinely reported.⁵⁷

In addition to state-sanctioned violence, death squads comprised of soldiers, police, and mercenaries defend the status quo against political insurgents, criminals, and even gangs of street children in Rio de Janeiro.⁵⁸ A report by the São Paulo chapter of the Brazilian Bar Association revealed that "the military police and death squads paid by shantytown shopkeepers killed most of the nearly 1,000 street children slain [in São Paulo] in 1990."⁵⁹ Their actions are "officially tolerated, if not directly encouraged" by the government.⁶⁰ Often, these killings are also encouraged and appreciated by the poor, who "feel every bit as besieged by crime, if not more so, as the rich and middle class do."⁶¹

Nor are prisons any safer than the streets. Police massacred 111 prison inmates at the Carandiru prison in 1992.⁶² In retaliation for a prison disturbance in 2000, police at the "Americana City Jail in São Paulo state . . . made more than one hundred detainees strip and then run a gauntlet. Police in two parallel lines beat the semi-naked prisoners with whips, bats, iron bars, bottles, and other objects; afterwards, they poured vinegar and saltwater over the prisoners' open wounds."⁶³ Finally, human rights groups

⁵⁵ See MARES, *supra* note 1, at Table 4. For comparison, New York City had twenty-seven deaths in 1991. *Id.*

⁵⁶ See *Human Rights Developments: Brazil*, *supra* note 49.

⁵⁷ See *id.* The report, released by the police ombudsman in July of 2001, also found that over half of the victims had no prior criminal record. *Id.*

⁵⁸ MARES, *supra* note 1, at 6.

⁵⁹ Nancy Scheper-Hughes & Daniel Hoffman, *Kids Out of Place, Part 2*, North American Congress on Latin America, Report on the Americas (1994), available at http://www.pangaea.org/street_children/latin/sheper2.htm (last visited Mar. 13, 2003). For further information regarding street children, see Brazilian journalist Gilberto Dimenstein's book, *BRAZIL: WAR ON CHILDREN* (1991).

⁶⁰ MARES, *supra* note 1, at 6.

⁶¹ Scheper-Hughes & Hoffman, *supra* note 59.

⁶² See *Human Rights Developments: Brazil*, *supra* note 49.

⁶³ *Id.*

and public prosecutors have documented numerous instances of mass beatings in juvenile detention centers throughout Brazil.⁶⁴

Protesters have had limited success in bringing past atrocities to light. Responses to calls for justice led Brazil to officially recognize as dead 136 missing political activists.⁶⁵ In 1995, President Fernando Henrique Cardoso enacted a law that published the list of dead, and ensured financial compensation for the victims' families.⁶⁶ Although the military perpetrators of the deaths are still immune under the amnesty law, "Brazil was convinced that the adoption of a reparation policy with regard to past events was a moral obligation in societies that had triumphed over authoritarianism."⁶⁷

D. Chile

The Chilean Amnesty Decree Law of 1978 grants amnesty to all persons who committed criminal offenses related to General Augusto Pinochet's military government between September 1973 and March 1978.⁶⁸ The law "applies to both actual perpetrators and accomplices before and after the fact," and "does not discriminate based on the motives for the crime. It applies equally, no matter if the crimes were committed out of personal animosity or in furtherance of state policy."⁶⁹ Furthermore, the law "has no provisions for an investigatory body to consider the amnestied acts in a non-criminal context. Nor does it provide a means of civil redress for victims to seek pecuniary compensation, either from the perpetrator or from the state."⁷⁰ The United Nations has condemned the Decree, stating that it is incompatible with "the duty of the State to investigate human rights

⁶⁴ See *id.*

⁶⁵ See United Nations Human Rights Committee, *Commission Continues Debate on Human Rights of Detainees, Efforts to End Torture*, Press Release HR/CN/721 available at <http://www.un.org/News/Press/docs/1996/19960410.hrcn731.html> (Apr. 10, 1996).

⁶⁶ See *id.*

⁶⁷ *Id.*

⁶⁸ See United Nations Human Rights Committee, *Human Rights Committee Concludes Sixty-Fifth Session Held At Headquarters From 22 March to 9 April*, Press Release HR/CT/540 available at <http://www.un.org/News/Press/docs/1999/19990409.hrct540.htm> (Apr. 9, 1999); *Chile: Legal Brief on the Incompatibility of Chilean Decree Law No. 2191 of 1978 with International Law*, Amnesty International, available at [http://web.amnesty.org/aidoc/aidoc_pdf.nsf/index/AMR220022001ENGLISH/\\$File/AMR2200201.pdf](http://web.amnesty.org/aidoc/aidoc_pdf.nsf/index/AMR220022001ENGLISH/$File/AMR2200201.pdf) (last visited Mar. 13, 2003).

⁶⁹ Burke-White, *supra* note 20, at 484.

⁷⁰ *Id.* at 485.

violations, to guarantee freedoms from such violations and to ensure that similar violations did not occur.”⁷¹

Three years after General Pinochet was defeated in a plebiscite in 1988, the Chilean Government’s Commission for Truth and Reconciliation presented its findings regarding his reign of terror from 1973 to 1988.⁷² The Commission reported that the Pinochet military government tortured and killed 3,197 Chileans.⁷³ Unofficial reports suggest a range of numbers from 5,000⁷⁴ to 30,000,⁷⁵ and neither of these figures includes thousands of others who survived “torture, arbitrary arrest or exile.”⁷⁶ The Commission also reported chilling prison conditions, in which “people were tortured with electric shocks, choking, confinement and even animal rape.”⁷⁷

Although General Pinochet has been directly connected with these atrocities, he has not yet been tried in a court of law. Arrested in 1998 in London, Pinochet is currently involved in a complicated case revolving around the issues of sovereign immunity and Britain’s ability to extradite Pinochet to Spain.⁷⁸ In August of 2001, the Supreme Court of Chile affirmed a lower court decision to remove Pinochet’s immunity.⁷⁹ Although

⁷¹ See *Human Rights Committee Concludes*, *supra* note 68.

⁷² See Remember-Chile: General Pinochet and Human Rights Abuses, *The Crimes: Pinochet’s Chile*, available at <http://www.remember-chile.org.uk/beginners/index.htm#crimes> (last modified Apr. 27, 2000). Commonly called the Rettig Commission, the Commission was established by President Patricio Aylwin in 1990, and reported its findings in 1991. *Id.*

⁷³ See *id.*

⁷⁴ MARES, *supra* note 1, at Table 2.

⁷⁵ See Michael P. Scharf, *The United States and The International Criminal Court The ICC’s Jurisdiction Over the Nationals of Non-Party States: A Critique of the U.S. Position*, 64 LAW & CONTEMP. PROBS. 67, 90 (2001).

⁷⁶ Remember-Chile: General Pinochet and Human Rights Abuses, *Letter from 31 Members of the United States House of Representatives to President Clinton* (Feb. 24, 2000), available at <http://www.remember-chile.org.uk/declarations/00-02-24usreps.htm> (last modified Apr. 27, 2000).

⁷⁷ Remember-Chile: General Pinochet and Human Rights Abuses, *The Crimes: Pinochet’s Chile*, *supra* note 72 (citing the Rettig Commission for Truth and Reconciliation (1991)), available at <http://www.remember-chile.org.uk/beginners/index.htm#crimes>.

⁷⁸ Remember-Chile: General Pinochet and Human Rights Abuses, *Introduction: Pinochet’s Arrest*, available at <http://www.remember-chile.org.uk/beginners/index.htm#intro> (last modified Apr. 27, 2000).

⁷⁹ See Human Rights Watch World Report 2001, *Human Rights Developments: Chile*, available at <http://www.hrw.org/wr2k1/americas/chile.html> (last visited Mar. 13,

Pinochet's poor health may make it unlikely a trial on the substantive issues of the General's orders to torture and kill will commence, the removal of his immunity has been seen as a landmark victory for human rights and rule of law advocates.⁸⁰

Also in 2001, talks known as the Roundtable Dialogue, established by former President Eduardo Frei, resulted in an unprecedented accord between the military, police, human rights attorneys, and representatives of churches and civil society.⁸¹ The accord, enacted into law by Congress, commits the military and police to provide the fullest information possible regarding the whereabouts of the disappeared within six months and includes an acknowledgement by those forces of their responsibility for the atrocities committed during Pinochet's regime.⁸²

E. Colombia

In Colombia, violence has escalated into perhaps the "dirtiest war" in Latin America. In the last forty years of confrontation between "guerrillas, the government, the mob, paramilitaries," and drug dealers, 70,000 people have been killed, while 600,000 have been displaced.⁸³ According to the Colombian Commission of Jurists, the average number of victims of political violence and deaths rose to fourteen per day in 2000.⁸⁴ In addition to these direct casualties, violence of everyday life in Colombia results in the murder of over 30,000 people every year.⁸⁵ Pressure tactics by guerrillas include "periodical attacks on town which they destroy public buildings and steal from local banks, the use of kidnapping, extortion of landowners and merchants, ambushes, laying of personnel mines and constant bombing of oil

2001). For a detailed discussion on the maneuvering of the Chilean military and Congress in support of Pinochet, as well as President Lagos' urging to those groups refrain from interfering in the judicial process, see id.

⁸⁰ See id.

⁸¹ See id.

⁸² See id.

⁸³ Camilo A. Azcarate, *Psychosocial Dynamics of the Armed Conflict in Colombia*, ONLINE JOURNAL OF PEACE AND CONFLICT RESOLUTION 2.1 (March 1999), available at http://www.trinstitute.org/ojpcr/2_1colombia.htm. Mr. Azcarate is the Government Programs Coordinator in the Massachusetts Office of Dispute Resolution.

⁸⁴ See Human Rights Watch World Report 2001, *Human Rights Developments: Colombia*, available at <http://www.hrw.org/wr2k1/americas/colombia.html> (last visited Mar. 13, 2001).

⁸⁵ See Azcarate, *supra* note 83.

pipelines and electricity towers.”⁸⁶ Guerillas and paramilitaries drove as many as 300,000 Colombians, mostly women and children, from their homes in 1998 alone.⁸⁷ Dominican Embassy members have been kidnapped, the Palace of Justice has been attacked, and numerous political leaders have been assassinated.⁸⁸ According to the International Commission of Jurists, thirty-one judges, lawyers, and prosecutors were the targets of threats, intimidation, or physical attacks in Columbia in 2000, while over one hundred other people in the administration of justice were harassed.⁸⁹

Official governmental response through the military has included countless battles and failed peace talks.⁹⁰ “Government security forces have [also] committed extrajudicial killings, disappearances, and massive internal displacement in the name of combating paramilitaries and guerillas.”⁹¹ For example, in 1999, the army fired on civilians, including elementary school children on a field trip.⁹² The “soldiers fired for forty minutes, ignoring the screams of the adult chaperones.”⁹³ Six children died, their deaths seemingly justified by army commander General Jorge Mora’s contention that “these are the risks of the war we are engaged in.”⁹⁴ Although a detailed analysis of these complicated and bloody confrontations is not possible here, it suffices to say that Colombian society lives in constant fear of these groups, and “the violence in general is a far-reaching illness in Colombia.”⁹⁵

F. Peru

In 1983, the Peruvian government transferred counterinsurgency operations from the police to the military in an effort to subdue guerrilla

⁸⁶ *Id.*

⁸⁷ Harold Hongju Koh, Conference on Human Rights in Colombia, Medellin, Colombia, Apr. 10, 1999, available at http://www.state.gov/www/policy_remarks/1999/990410_koh_colombia.html (last visited Sep. 28, 2001).

⁸⁸ See Azcarate, *supra* note 83.

⁸⁹ See International Commission of Jurists, *Attacks on Justice 2000—Colombia*, available at <http://icj.org/article.php?sid=101> (last modified Aug. 13, 2001).

⁹⁰ See Azcarate, *supra* note 83.

⁹¹ Koh, *supra* note 87.

⁹² See *Human Rights Developments: Colombia*, *supra* note 84.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ Azcarate, *supra* note 83.

groups.⁹⁶ In the following nine years until President Alberto Fujimoro assumed office in 1992, human rights organizations documented over 4000 disappearances and 500 extrajudicial executions.⁹⁷ In 1995, Peru enacted the First Amnesty Law, covering the years of 1980 to 1995.⁹⁸ The law grants amnesty to military, police, or civilian personnel who have committed "common or military crimes, whether within the jurisdiction of civil or military courts."⁹⁹ It has only one limitation: that the crime is "derived, originated from, or a consequence of the fight against terrorism."¹⁰⁰ After a trial court found the law inapplicable to crimes committed during the 1991 massacre at Barrios Altos, the Peruvian Congress passed the second amnesty law in 1996.¹⁰¹ The second law prohibited judicial review of the first amnesty law, declaring that "amnesty . . . is a right of grace . . . which can only be granted exclusively by Congress."¹⁰² In 2001, Congress proposed a third amnesty law to extend amnesty to human rights crimes committed since 1995.¹⁰³

Although outlawed in 1998, torture remains widespread throughout Peru, as are physical attacks and death threats against journalists.¹⁰⁴ A commission established by President Fujimoro in 1996 recommended and secured the release of 481 prisoners wrongly charged under antiterrorist laws; however, the commission's mandate expired in 1999 and has not been renewed.¹⁰⁵ Human rights groups note that "more than 50 applications approved for release by the commission await decision by the president, while four or five times that number have been presented" by these groups, with no action taken.¹⁰⁶

⁹⁶ See Burke-White, *supra* note 20, at 486. Guerilla groups include the Shining Path and the Tupac Amaru Revolutionary Movement.

⁹⁷ See *id.*

⁹⁸ See *id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ See *id.* at 488.

¹⁰² *Id.* at 489.

¹⁰³ See Human Rights Watch World Report 2001 *Peru: Human Rights Developments*, available at <http://www.hrw.org/wr2k1/americas/peru.html> (last visited Sept. 28, 2001).

¹⁰⁴ See *id.*

¹⁰⁵ See *id.*

¹⁰⁶ *Id.*

In July of 2001, President Fujimoro “dissolved Congress and assumed dictatorial powers.”¹⁰⁷ Fujimoro’s campaign for a third consecutive term was marked by physical violence, criminal accusations, death threats against journalists for the opposition, and physical attacks on opposition rallies.¹⁰⁸ During his inauguration, police “fired tear gas cartridges from moving vehicles and roof-tops as well as from positions in the street, sometimes at body height and directly at protesters.”¹⁰⁹ Human rights organizations and others suspect government complicity with regard to arson of several public buildings in the capital during the inauguration, after which armed guards attacked “firemen and destroyed firefighting equipment, harassed journalists, and threatened human rights observers, who were prevented from gaining access to the scene.”¹¹⁰ Although no one knows the direction President Fujimoro will take Peru, given the environment of violence and intimidation in which he assumed his dictatorial powers, further progress in human rights and legal reform is not expected.

G. Uruguay

The United Nations Human Rights Committee has expressed serious concern regarding Uruguay’s “Ley de Caducidad,” or “Law of Expiry.”¹¹¹ The law imposes a statute of limitations on human rights violations committed by the military and police during the military governments of 1973 to 1985, namely, the disappearances of 134 Uruguayans during that time period.¹¹² Speaking for the committee, Chairman Christine Chanet of France asserted that the law “sacrificed elements of justice for peace,” and that “not every matter could be resolved through financial reparation; neither

¹⁰⁷ *Id.*

¹⁰⁸ *See id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *See* United Nations Human Rights Committee, Press Release HR/CT/511, *Human Rights Committee Concludes Consideration of Report by Uruguay*, United Nations, available at <http://www.un.org/News/Press/docs/1998/19980327.HRCT511.html> (last modified Mar. 27, 1998); Amnesty International, *URUGUAY: The case of Simón Riquelme—A 25-year-struggle for truth and justice*, available at <http://web.amnesty.org/ai.nsf/Index/AMR520012001?OpenDocument&of=COUNTRIES%5CURUGUAY> (last modified July 26, 2001).

¹¹² *See id.*

justice nor peace should be allowed to suffer.”¹¹³ In response to these criticisms, Uruguay noted that the law had been supported in a referendum and upheld by the Supreme Court, and that with the reestablishment of basic freedoms the issue would be addressed at a future time.¹¹⁴

In 2000, Uruguayan president Dr. Jorge Batlle Ibáñez established the *Comisión para la Paz* (Peace Commission) to clarify the fate of all those Uruguayans who “disappeared” between 1973 and 1985.¹¹⁵ However, the Commission does not have the power to compel the testimony of witnesses, and at present it has gathered only information available from international organizations and the victim’s families.¹¹⁶ In addition, even if evidence surfaces regarding the military perpetrators of those crimes, the Amnesty Law prevents those military perpetrators from being brought to justice.¹¹⁷

III. INABILITY OF THE CURRENT JUDICIAL SYSTEM TO STEM VIOLENCE THROUGH ACCOUNTABILITY

La movida para mis amigos, y la ley para mis enemigos.

(Deals for my friends, the law for my enemies.)

Latin American saying

Corruption at all levels is a hallmark of many judicial systems in Latin America, and it results in a judiciary largely unable or unwilling to bring to justice perpetrators of the violence described above. Now that many Latin American countries are currently undergoing long and painful transitions from authoritarian regimes to more participatory forms of government, judicial reform has become a priority for both national and international

¹¹³ United Nations Human Rights Committee, Press Release HR/CT/511, *Human Rights Committee Concludes Consideration of Report by Uruguay*, United Nations, available at <http://www.un.org/News/Press/docs/1998/19980327.HRCT511.html> (last modified Mar. 27, 1998).

¹¹⁴ *See id.*

¹¹⁵ *See* Amnesty International, *URUGUAY: The case of Simón Riquelme - A 25-year-struggle for truth and justice*, available at <http://web.amnesty.org/ai.nsf/Index/AMR520012001?OpenDocument&of=COUNTRIES%5CURUGUAY> (last modified July 26, 2001).

¹¹⁶ *See id.*

¹¹⁷ *See id.* However, this has not prevented the prosecution of the Uruguayan military and police in other countries. In June 2001, Argentinean judge Rodolfo Carnicoba Corral ordered the preventive detention of three Uruguayan army officers and one Uruguayan police officer, for their alleged involvement in the disappearances of over twenty Uruguayan citizens in Argentina in the seventies. *See id.*

organizations. However, this transition stage dramatically increases opportunities for corrupt behavior and has resulted in judicial systems riddled with corruption and hamstrung by inefficient and ineffective bureaucracies.¹¹⁸ Low compensation and weak monitoring systems have traditionally been causally linked to the corruption, causing some scholars to observe that the corruption is a rational result of weak deterrence, since "corrupt activities occur when the marginal returns from crime exceed the marginal returns from legal occupation by more than the expected value of the penalty."¹¹⁹ Judges who fight against that corruption not only put their careers in jeopardy, but expose themselves and their families to serious, and often fatal, bodily injury.¹²⁰ In Colombia, "drug dealers often give officials the choice between plata o plomo (money or lead bullet)."¹²¹ In addition, Colombian judges are routinely harassed and threatened whenever they preside over "cases involving members of the armed forces or paramilitary, narcotics or guerilla organizations."¹²²

One Mexican commentator postulates that this corruption and inefficiency has its origins in "the old Spanish colonial state—with its enduring paternalism, corruption, bureaucracy, and extreme centralization," and can never "be exorcised completely."¹²³ Moreover, according to Peruvian commentator Javier de Belaúnde:

[T]here is a growing sense of judicial insecurity, of lack of protection of citizens in the face of violence and abuse . . . structural impunity for those who violate the law . . . an even louder call for respect for the fundamental

¹¹⁸ See Edgardo Buscaglia & Maria Dakolias, *An Analysis of the Causes of Corruption in the Judiciary*, 30 LAW & POL'Y INT'L BUS. 95, 95 (1999).

¹¹⁹ *Id.* at 97–98.

¹²⁰ See William Ratliff & Edgardo Buscaglia, *Judicial Reform: The Neglected Priority in Latin America*, 550 ANNALS AM. ACAD. POL. & SOC. SCI. 59, 65 (1997).

¹²¹ *Id.* (citing ETHAN NADELMANN, COPS ACROSS BORDERS: THE INTERNATIONALIZATION OF U.S. CRIMINAL LAW ENFORCEMENT 258, 309 (1993)).

¹²² Koh, *supra* note 87. Intimidation and threats of violence are also targeted at Colombian witnesses and prosecutors. See *id.*

¹²³ EDGARDO BUSCAGLIA JR. ET AL., JUDICIAL REFORM IN LATIN AMERICA: A FRAMEWORK FOR NATIONAL DEVELOPMENT 2 (1995) (quoting Enrique Krause, *Old Paradigms & New Openings in Latin America*, Jan. 1992 JOURNAL OF DEMOCRACY 20, 21).

rights and public freedoms . . . and justice has remained bound to the structure of colonial society.¹²⁴

Without a strong judicial system that fairly enforces rational laws, the economic, social, and political framework of democratic government and society will be undermined.¹²⁵ Minister Marcos Aburto Ochoa, President of the Supreme Court of Chile, has said that “people can survive without wealth, and even without good health; they may live badly, but they will survive. What they cannot do is live without justice. Justice is part and parcel of the quality of life—and is the most urgent issue facing the world today.”¹²⁶

The hypothesis of this article is that mediation can address some of the problems of corruption, inefficiency, and ineffectiveness. This section provides a discussion and analysis of how the current corruption, inefficiency, and ineffectiveness of Latin American judicial systems was established under authoritative regimes, and is maintained under the current transitional democracies. Specifically, Subpart A discusses the public mistrust of the judicial system. Subpart B then analyzes the underlying reasons for this mistrust, *i.e.* the causes of current corruption of the judiciary and court officials. In addition, B.1 concerns the inherent administrative problems relating to court inefficiency and ineffectiveness, and shows how the judicial system as currently administered reinforces and institutionalizes inefficiency. Subpart B.2 then describes the lack of judicial independence, and provides possible political and procedural reasons for this judicial subjugation.

A. Public mistrust

Magistrate Judge Wayne Brazil has theorized, “[o]ver time, in a democracy, the people will comply only if they trust and respect the courts as

¹²⁴ Luis Pásara, *Judicial Reform and Civil Society*, in JUSTICE DELAYED: JUDICIAL REFORM IN LATIN AMERICA 83, 85 (Edmundo Jarquín & Fernando Carrillo eds., 1998) (quoting Javier de Belaúnde, *Institucionalidad jurisdiccional del Poder Judicial*, in NUEVAS PERSPECTIVAS PARA LA REFORMA INTEGRAL DE LA ADMINISTRACIÓN DE JUSTICIA EN EL PERÚ (1994)).

¹²⁵ See Ratliff & Buscaglia, *supra* note 120, at 60.

¹²⁶ Luis Manriquez Reyes, *Modernization of Judicial Systems in Developing Countries: The Case of Chile, 195–96*, in JUDICIAL REFORM IN LATIN AMERICAN AND THE CARIBBEAN (Malcolm Rowat et al., eds.), World Bank Technical Paper No. 280 (1995).

institutions.”¹²⁷ Without trust in the judiciary, societies have no reliable methods “to ensure that the other institutions can be held accountable,” and will therefore have no reason to trust the so-called “democratic” governments in general.¹²⁸ Perception of the judiciary as incorruptible is therefore essential to a well-run democratic system, since if the judiciary “or other groups are perceived as being exempt or above the laws . . . the legitimacy accorded it by the people, will be seriously lacking.”¹²⁹ Accordingly, increasing the public’s trust and respect in the judiciary by rooting out corruption and ineffectiveness must be a fundamental element of any judicial reform program.¹³⁰

Unfortunately, “a world competitiveness report that rates judicial systems of the world not only on the basis of efficiency but also on the opinions of users and public confidence, puts all Latin American systems except Chile’s in the bottom 20 percent.”¹³¹ In general, Latin Americans view the administration of justice as “slow, tending to favor those in power, and corrupt.”¹³² Specifically, surveys in Argentina, Brazil, Ecuador, and Peru found that “between 55 percent and 75 percent of the public manifest a very low opinion of the judicial sector.”¹³³ In many countries, this makes the judiciary “less trusted than either the national police or intelligence services.”¹³⁴

For instance, sixty-five percent of Argentineans surveyed believe that the system was “unjust, partial, biased in favor of the rich, corrupt, above the

¹²⁷ Wayne D. Brazil, *Comparing Structures for the Delivery of ADR Services by Courts: Critical Values and Concerns*, 14 OHIO ST. J. ON DISP. RESOL. 715, 738 (1999).

¹²⁸ Buscaglia & Dakolias, *supra* note 118, at 111.

¹²⁹ *Id.* at 111 (quoting KIMBERLY LYNN THACHUCK, PLOMO O PLATA: POLITICS, CORRUPTION AND DRUG POLICY IN COLOMBIA 79 (Sept. 1997) (unpublished Ph.D. dissertation, Simon Fraser University)).

¹³⁰ See BUSCAGLIA JR. ET AL., *supra* note 123, at 3.

¹³¹ *Id.*

¹³² Pásara, *supra* note 124, at 83.

¹³³ BUSCAGLIA JR. ET AL., *supra* note 123, at 5.

¹³⁴ Maria Dakolias, *Court Performance around the World: A Comparative Perspective*, 2 YALE HUM. RTS. & DEV. L.J. 87, 130 (1999) [hereinafter *Court Performance around the World*] (citing *Peru: Poll Shows People Do Not Trust Most Government Institutions*, FBIS, Sept. 3, 1997, available in FBIS, Doc. No. FBIS-LAT-97-246).

law, politicized, [and] prone to personal favors.”¹³⁵ Even in Chile, survey respondents described their judicial system as “bad, inefficient, discriminatory, arbitrary and slow.”¹³⁶ According to a 1989 survey by the Corporation for University Promotion, eighty-three percent of those surveyed “expressed a negative opinion about the justice system in general, frequently referring to its discriminatory character.”¹³⁷ In Colombia, a public survey ranked its judiciary “forty-fifth out of forty-six countries in a 1998 study of public confidence in the fair administration of justice.”¹³⁸ Another poll found that eighty-nine percent “thought that judges were susceptible to bribes, and eighty-five percent thought that judges did not apply the law evenhandedly.”¹³⁹

Surveys have also found that judges are thought to be more concerned with personal gain than justice, and the system in general is not perceived as attracting and keeping high-quality judges and personnel.¹⁴⁰ In Peru, a survey conducted in 1999 found that a full sixty-one percent lacked “confidence in the honesty of judges.”¹⁴¹ One consequence of this mistrust is the under-use of the system to address serious abuses. For instance, Chileans and Ecuadorians complain about corruption and abuses to the media, rather than to the judiciary.¹⁴² And as stated earlier in Section II, claims of human rights abuses by Brazilian police must currently be heard either in corrupt state courts or internal police tribunals. Of the over one thousand murders of landless campesinos, only forty-seven cases have been brought to court, and only five have sustained convictions.¹⁴³ In short, understandable public mistrust in the judiciaries of Latin America permeates every aspect of that

¹³⁵ Gladys Stella Alvarez, *Alternative Dispute Resolution Mechanisms: Lessons of the Argentine Experience*, in JUDICIAL REFORM IN LATIN AMERICAN AND THE CARIBBEAN 81 (Malcolm Rowat et al., eds.), World Bank Technical Paper No. 280 (1995).

¹³⁶ BUSCAGLIA JR. ET AL., *supra* note 123, at 6.

¹³⁷ Maria Dakolias, *Legal and Judicial Development: The Role of Civil Society in the Reform Process*, 24 FORDHAM INT’L L.J. S26, S36 (2002). The Corporation for University Promotion is a non-profit organization founded in 1968, and has conducted numerous studies of educational and legal reforms. *See id.*

¹³⁸ Dakolias, *Court Performance around the World*, *supra* note 134, at 115 (citing World Economic Forum, *The World Competitiveness Yearbook* 1998 app. 3.41 (1998)).

¹³⁹ *Id.* at 115 (citing interview with Alfredo Fuentes Hernandez, Executive Director of Corporación Excelencia en la Justicia, in Bogotá, Colombia (July 28, 1998)).

¹⁴⁰ BUSCAGLIA JR. ET AL., *supra* note 123, at 6.

¹⁴¹ Dakolias, *Court Performance around the World*, *supra* note 134, at 118.

¹⁴² *See* Buscaglia & Dakolias, *supra* note 118, at 101.

¹⁴³ *See Brazil: Capture*, *supra* note 48.

judicial system, and has disastrous consequences for establishing and maintaining viable democracies.

B. *Corruption of the Judicial System*

In Latin America, corruption as an everyday occurrence was established in colonial times under Spanish rule, where "venality, graft, speculation, and personal use of public funds attended the operation of government at all levels."¹⁴⁴ Defining corruption can itself be a difficult task, since acceptable norms of behavior are often diametrically opposed to legal requirements.¹⁴⁵ For example, legally acceptable fees for filing a case in Latin America must be supplemented with substantial bribes (rents) to judicial officials and personnel. In Argentina, Brazil, Ecuador, and Venezuela, these bribes account for eight to twelve percent of court costs to parties.¹⁴⁶ Bribes have become such an integral and expected part of the judicial systems in Latin America that the average person, "who cannot receive a public service due to an inability to pay the legal fee, ceases to demand the public good from the official system."¹⁴⁷

Judicial incentives for accepting and demanding these bribes range from "low salaries, opportunities, bad working conditions, greed, tradition, and fear."¹⁴⁸ These factors are compounded by "short, fixed terms," "insecure and inadequate judicial pensions," and secret judicial appointments.¹⁴⁹ Finally, although Latin American systems prohibit ex parte communication between judges and parties and their counsel, in practice judges routinely meet with counsel to discuss their case.¹⁵⁰ These communications present those judges with "almost unlimited opportunities to exact favors for their services."¹⁵¹ Fortunately, public opposition to judicial corruption has

¹⁴⁴ Ratliff & Buscaglia, *supra* note 120, at 65 (quoting CHARLES GIBSON, *SPAIN IN AMERICA* 107-08 (1966)).

¹⁴⁵ *Id.* (quoting ETHAN NADELMANN, *COPS ACROSS BORDERS: THE INTERNATIONALIZATION OF U.S. CRIMINAL LAW ENFORCEMENT* 258, 309 (1993)).

¹⁴⁶ BUSCAGLIA JR. ET AL., *supra* note 123, at 11.

¹⁴⁷ Buscaglia & Dakolias, *supra* note 118, at 112 (citing Edgardo Buscaglia, *An Analysis of Corrupt Practices Within the Judiciary in Latin America*, in *ESSAYS IN LAW AND ECONOMICS IV* 223, 234 (Claus Ott & Georg von Wangenheim eds., 1998)).

¹⁴⁸ Ratliff & Buscaglia, *supra* note 120, at 65.

¹⁴⁹ BUSCAGLIA JR. ET AL., *supra* note 123, at 11.

¹⁵⁰ See Roberto MacLean, *The Culture of Service in the Administration of Justice*, 6 *TRANSNAT'L L. & CONTEMP. PROBS.* 139, 158 (1996).

¹⁵¹ Ratliff & Buscaglia, *supra* note 120, at 65.

increased as Latin America has begun the difficult transition from authoritarian regimes to true participatory democracies.¹⁵² For example, Argentines now rank corruption as the second most significant cause of problems in the country.¹⁵³ According to Jorge Bacque, the 1999 head of the national bar association and former chief justice of the Supreme Court of Argentina, “[i]t’s no longer enough to talk about corruption. If substantial changes aren’t made, the judicial system will hit bottom.”¹⁵⁴

Latin American legal scholars Buscaglia and Dakolias speculate that the presence of the following factors increases the ability of the judiciary and judicial personnel to extract bribes from parties and counsel wishing to use the court system.

- Greater administrative power in the hands of fewer judges;
- Procedural complexity;
- The lack of accessible legal databases to aid in the widespread publication of judicial opinions;
- The lack of ADR processes offered by the government; and
- The inability and unwillingness of private parties to act in concert to prevent and abstain from bribery.¹⁵⁵

This subsection will discuss various aspects of this judicial corruption. Subsection B.1 will discuss the administrative problems that give rise to and are exacerbated by corruption, while Subsection B.2 will describe how the current selection and retention of the judiciary acts to encourage corrupt behavior and inhibit judicial independence. Finally, this subsection will analyze how the lack of stare decisis and unclear jurisdictional boundaries provide opportunities for arbitrary and corrupt decisions.

1. *Administrative Problems*

Administrative problems in Latin American judicial systems surround both court administration, involving budgets and personnel, and case management. Individual courts are invariably administered directly by judges, yet “few are sufficiently trained in accounting and financial

¹⁵² Buscaglia & Dakolias, *supra* note 118, at 115 (citing Robert S. Leinken, *Controlling the Global Corruption Epidemic*, FOREIGN POL’Y, Winter 1996–97, at 55, 68).

¹⁵³ Buscaglia & Dakolias, *supra* note 118, at 113.

¹⁵⁴ Lucien O. Chauvin et al., *Justice: The Cinderella of Latin America, Complacency in the Court*, May 10, 1999, Latinamerica Press (SIRS Knowledge Source).

¹⁵⁵ See Buscaglia & Dakolias, *supra* note 118, at 100.

affairs.”¹⁵⁶ In many countries these administrative duties account for sixty-five to seventy-five percent of a judge’s time, and cause corresponding delays in judicial decision-making.¹⁵⁷ Because administrative duties account for much of a judge’s rent seeking capacity (*i.e.* opportunity for bribery), most judges are unwilling to delegate these administrative responsibilities.¹⁵⁸ The result is “gross inefficiency in record management, case-flow and caseload management, and maintaining case statistics and archives.”¹⁵⁹

Another wrinkle in this administrative problem is the fact that most Supreme Courts of Latin America maintain control over the overall judicial administration, often requiring lower courts “to make the simplest requests to a centralized office.”¹⁶⁰ The Supreme Courts also centralize judicial budgets.¹⁶¹ Budgets are allocated to specific courts without local input, and are often routinely and spectacularly deficient in terms of actual caseloads.¹⁶² For example, court staffs in Ecuador are assigned according to regulation and “without reference to caseloads[,]” so that “in some courts there is a shortage of personnel and others there is a surplus.”¹⁶³ Overall however, judicial budgets are inadequate and “allow for only minimal standards of justice.”¹⁶⁴

One byproduct of systemic corruption manifests itself in endless delays. The time to disposition in Latin America has reached “unprecedented proportions,”¹⁶⁵ with “[civil] cases commonly tak[ing] up to 12 years to be resolved in court.”¹⁶⁶ A lack of standards relating to time to disposition exacerbates the situation, and increases the opportunities for rent seeking.¹⁶⁷

¹⁵⁶ BUSCAGLIA JR. ET AL., *supra* note 123, at 13.

¹⁵⁷ *See id.*

¹⁵⁸ *See id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 14.

¹⁶¹ Maria Dakolias, *A Strategy for Judicial Reform: The Experience in Latin America*, 36 VA. J. INT’L L. 167, 191 (1995).

¹⁶² BUSCAGLIA JR. ET AL., *supra* note 123, at 14.

¹⁶³ *Id.* (citing Interview with Robert Page (June 30, 1994)).

¹⁶⁴ Dakolias, *supra* note 161, at 190.

¹⁶⁵ BUSCAGLIA JR. ET AL., *supra* note 123, at 24 (citing CENTRAL INTELLIGENCE AGENCY (CIA), *WORLDFACT BOOK: 1994* (1994)).

¹⁶⁶ Dakolias, *supra* note 161, at 170–71 (citing Edgardo Buscaglia & Maria Dakolias, *Judicial Reform in Latin American Courts: The Experience in Argentina and Ecuador* 9 (1995) (unpublished manuscript, on file with author Maria Dakolias)).

¹⁶⁷ *See* Buscaglia & Dakolias, *supra* note 118, at 103 (citing Edgardo Buscaglia & Maria Dakolias, *Judicial Reform in Latin American Courts: The Experience in Argentina and Ecuador*, WORLD BANK TECH PAPER No. 350 13 (1996)).

According to a judicial specialist for the World Bank, delays permeate every facet of the legal system in Latin America, and can exponentially increase litigation costs.

In a South American country that I visited, each time users of the justice system inquired as to the status of their case, they had to wait patiently in a line for two hours, only to reach the window of the office and rudely be told that the person they were looking for was not available.¹⁶⁸

Current case management in Latin America is marked by judicial passivity. Over ninety percent of Chilean judges agreed that judges fail to actively move cases through the system, and rely on counsel and litigants to “determine the speed of litigation.”¹⁶⁹ Pásara postulates that adherence to “ritualistic formalism, bureaucratic behavior, and lack of legal interpretation all contribute” to this passivity, and results in the classic example of the “persons held in pretrial detention who have no attorney: they will remain in detention, and may never even get a verdict. Someone else has to ‘move the case,’ for the judge will not.”¹⁷⁰ This means that plaintiffs are often at the mercy of wealthy defendants who wish to delay as long as possible.

Criminal cases fare little better in Latin America. In Colombia, threats to judges, witnesses, and prosecutors have resulted in the successful prosecution of only three to seven percent of all crimes committed nationally.¹⁷¹

One factor that encourages these types of delays and hampers efficient administration is the lack of information technology within the judicial systems. Computerization of routine tasks would not only make “the processing of cases more efficient,” but would significantly decrease the opportunities for court personnel and judges to “request bribes for moving cases along.”¹⁷² For example, a recent study of Chilean and Ecuadorian courts found that “increasing the use of computer monitoring systems . . . cause[s] a decrease in the reports of corrupt practices.”¹⁷³ Thus, in addition to providing for easier outside review of judicial decisions in individual cases, the outside review made possible by computer monitoring

¹⁶⁸ MacLean, *supra* note 150, at 156.

¹⁶⁹ See BUSCAGLIA JR. ET AL., *supra* note 123, at 25.

¹⁷⁰ Pásara, *supra* note 124, at 88.

¹⁷¹ Koh, *supra* note 87.

¹⁷² BUSCAGLIA JR. ET AL., *supra* note 123, at 25–26.

¹⁷³ Buscaglia & Dakolias, *supra* note 118, at 107.

and access to decisions would help make legal decisions more consistent within jurisdictions.

In contrast to the significance between information technology and efficiency, a factor that does not apparently have a strong correlation to delay is the number of judges in a jurisdiction. Studies have shown that "the correlation between the number of judges per million inhabitants and efficiency is low."¹⁷⁴ This makes sense when one considers that the current judiciary has a built-in incentive to maintain current delays in order to capitalize on maximum "rents." In other words, judicial reform solely based on increasing the number of judges will not translate into decreased time to disposition due to those built-in incentives. In contrast, an increase in judges willing to decide cases expeditiously without requiring parties to resort to bribery would translate into decreased time to disposition.

In sum, administrative deficiencies play a very large role in sustaining the current inefficiency and ineffectiveness of Latin American judicial systems. While in part a result of lack of financial resources, the most significant problems arise from centralized management, lack of local control and input, judicial passivity regarding case management, and in general, the poor administrative skills of the judiciary. Any substantial reform effort must be cognizant of the inherent opposition the current judiciary has towards that reform. This is because the current judiciary has an enormous vested interest in maintaining the status quo: decreased acceptance of rent seeking activities will substantially decrease both their incomes and influence as judges. In other words, administrative reform cannot be carried out by the current "winners" of the judicial systems, because these players have no real incentives to change the system. For these reasons, reform efforts must "ensure that short-term benefits compensate for the loss of illicit rents previously received by court officers responsible for implementing changes."¹⁷⁵ Only with these short-term benefits in place may a reform effort hope to change the fundamental problems in the administration of judicial systems.¹⁷⁶

¹⁷⁴ BUSCAGLIA JR. ET AL., *supra* note 123, at 9 (citing Edgardo Buscaglia, *A Quantitative Assessment of the Judicial Systems in Latin America*, presented at the Annual Meeting of the American Law and Economics Association, Berkeley, Cal., May 21-23, & 26, 1995).

¹⁷⁵ Buscaglia & Dakolias, *supra* note 118, at 108.

¹⁷⁶ Possible short-term benefits "include generous early retirement packages, promotions for judges and support staff, new buildings and/or expanded budgets." *Id.* at 109.

2. Judicial Independence

Judicial independence is said to be the cornerstone of any successful reform.¹⁷⁷ This independence encompasses freedom from interference from other governmental bodies, from other judges within the system, and from acceding to the wishes of political parties.¹⁷⁸ According to Ely, the judiciary itself is responsible for establishing and maintaining this independence, because "one of the surest ways to acquire power is to assert it."¹⁷⁹ Without this independence, studies demonstrate that legal uncertainty increases in systems in which jurisprudence is often based more on political interference than legal reasoning.¹⁸⁰ However, judicial independence in emerging political systems may or may not be appropriate if the goal is judicial reform. For example, an independent judiciary could be a benefit for judicial reform or an impediment if that judiciary wishes to preserve rent seeking activities for its own benefit.¹⁸¹ The following is a discussion of the lack of judicial independence in Latin America, and consequences this has for any meaningful judicial reform.

Latin American judiciaries have traditionally been subservient to the legislative and executive branches, and have no practical power to "clearly define laws promulgated by the legislatures."¹⁸² This subservience dates back to colonial times when the viceroy, or representative of the king, sat on the superior judicial body and had substantial power to interpret the law.¹⁸³ This tradition currently manifests itself in legislative and executive interventions in specific cases that only serve to "destroy public confidence and trust in the judicial system."¹⁸⁴

¹⁷⁷ See Edmundo Jarquín & Fernando Carrillo, *Introduction*, in *JUSTICE DELAYED: JUDICIAL REFORM IN LATIN AMERICA* vii (Edmundo Jarquín & Fernando Carrillo eds., 1998).

¹⁷⁸ Dakolias, *supra* note 161, at 172 (citing Owen M. Fiss, *The Right Degree of Independence*, in *TRANSITION TO DEMOCRACY IN LATIN AMERICA: THE ROLE OF JUDICIARY* 55, 55–56 (Irwin P. Stotsky ed., 1993)).

¹⁷⁹ *Id.* at 173 n.17 (quoting JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 47–48 (1980)).

¹⁸⁰ See BUSCAGLIA JR. ET AL., *supra* note 123, at 26 (citing ALAN WATSON, *THE CIVIL LAW* (1981)).

¹⁸¹ *See id.*

¹⁸² *Id.* at 13.

¹⁸³ *Id.* at 12 n.32 (citing ALEJO CARPENTEROS M., *HISTORIA JUDICIAL DE LATINOAMERICA* 15–16 (1978)).

¹⁸⁴ *Id.* at 13.

Unfortunately, many Latin American judiciaries are not free from pressure from higher courts either. For example, judges from the Chilean Supreme Court and Courts of Appeals "call lower court judges and weigh in with their opinion on certain cases."¹⁸⁵ Also in Chile, the Supreme Court annually ranks all judges, giving the court a great deal of power over judicial careers.¹⁸⁶ Some of these rankings "have been interpreted as punishment of lower court judges who have gone too far in contesting the Supreme Court's holdings on human rights issues."¹⁸⁷ Finally, as shown in the discussion of the Colombian judiciary's choice between *plata o plomo* in Section III, political parties such as drug dealers and paramilitaries have an inordinate amount of influence over judicial decisions.

Yet there are other factors that impinge upon judicial independence in Latin America. For example, the lack of *stare decisis* and unclear jurisdictional boundaries in terms of geography and subject matter have translated into an inability of Latin judiciaries to "make objective and well-reasoned decisions in order to hold the other two branches of government accountable."¹⁸⁸ Finally, low judicial salaries, inadequate or insecure pensions, and ineffective disciplinary and appointment systems all contribute to encourage and permit judges to not only accept and demand bribes but to tailor their judicial opinions for financial gain.¹⁸⁹

VI. MEDIATION AS A CATALYST FOR JUDICIAL REFORM

Given the above described violence and demonstrated inability of Latin American judiciaries to control and channel the motivations behind that violence into productive opportunities for change, the remainder of this article will analyze the possibilities of mediation as a catalyst not only for judicial reform, but also for societal change. Subpart A will discuss how mediation can alleviate current systemic problems in Latin American legal systems. Subpart B then describes mediation programs already in place throughout Latin America highlighting procedural distinctions and their causes.

¹⁸⁵ Dakolias, *Court Performance Around the World*, *supra* note 134, at 114 (citing Sergio Urrejola, *Cambios requeridos en Chile*, in *LA EXIGENCIA DE JUSTICIA EN EL MUNDO ACTUAL* 38, 40 (1996)).

¹⁸⁶ See MacLean, *supra* note 150, at 161.

¹⁸⁷ *Id.*

¹⁸⁸ BUSCAGLIA JR. ET AL., *supra* note 123, at 13.

¹⁸⁹ See Dakolias, *supra* note 161, at 173–84.

A. *Theory of Mediation*

According to Mares, Latin American fears of violence center on “the survival of democratic systems.”¹⁹⁰ The Central American Treaty for Democratic Peace of 1995 identified four principles for ensuring peaceful societies and maintaining these democratic systems:

- The rule of law;
- The strengthening and perfecting of democratic institutions;
- The subordination of the armed forces to constitutionally mandated civilian authorities; and
- The maintenance of an active, flexible, and mutually collaborative dialogue.¹⁹¹

Aside from the reference to armed forces, the remaining principles relate directly to the themes of this article. That is, judicial reform encompasses the rule of law and the reinforcement of democratic institutions, which, we will show, can be strengthened and facilitated through mediation. Subsection A.1 explores mediation as an alternative to a corrupt judicial system, paying particular concern to the role of mediation in current and future judicial reforms. Yet mediation goes beyond structural reform of the judicial system. Societal changes are also possible through the judicious use of mediation as a tool to establish and maintain collaborative dialogue. Accordingly, Subsection A.2 fleshes out this idea of mediation as a mechanism for collaborative dialogue to establish and maintain a culture of non-violent and constructive social interaction in Latin America. Finally, by allowing for an official alternative to the current judicial system, mediation can strengthen public trust in that system and in government in general. Subsection A.3 analyzes mediation from this perspective, and demonstrates how effective court mediation programs can increase public confidence in the system.

1. *Mediation as an Alternative to a Corrupt Judicial System*

Acknowledging that the situation in Latin America regarding judicial inadequacies is serious, many countries are attempting to implement reforms that will revitalize and legitimize the legal system. For example, many countries have established judicial councils to nominate judges, establish and

¹⁹⁰ See MARES, *supra* note 1.

¹⁹¹ *Id.* (citing FRANCISCO ROJAS ARAVENA, CENTROAMÉRICA: NUEVA AGENDA DE SEGURIDAD 7).

enforce professional standards, and determine budgetary needs.¹⁹² Others have passed procedural reforms to help hold judges publicly accountable for their decisions.¹⁹³ However, as discussed earlier, these reforms are at odds with judicial rent seeking activities, and as such cannot be expected to have immediate success without a drastic overhaul of the current judiciary. For example, although legal education regarding public rights is essential for improving access to the courts, many court officials “consider a public that is aware of its legal rights a threat to their rent seeking activities.”¹⁹⁴ Therefore, meaningful reform of legal aid services cannot be accomplished while judges continue to demand these destructive bribes.

Although mediation itself will not solve the systemic deficiencies in Latin American judicial systems, it may be “the most immediately viable response[.]” to the corruption, inefficiency, and damage to most Latin courts.¹⁹⁵ Essentially, viable mediation programs allow the public to bypass “the corruption and delays of the formal justice system, thus reducing judicial caseloads and opportunities for rent seeking.”¹⁹⁶ In Chile and Ecuador, a study done on corruption and its causes in the judicial system demonstrated that the introduction of private sector mediation and arbitration in those countries reduced judicial corruption by a substantial amount.¹⁹⁷

Because most of Latin America is precluded from using the formal justice system in that they cannot afford to pay the substantial bribes to judicial officials, mediation could also substantially increase access to justice.¹⁹⁸ This would have the greatest impact on the poor, since they would have recourse to an official dispute resolution process for perhaps the first time. In addition, emerging businesses often forego bringing cases to court because their financial constraints preclude them from offering the mandatory bribes. Because of this inability to have recourse to the judicial system, many “are deterred from entering a market.”¹⁹⁹ Mediation would allow these businesses to have some forum for relief.

Gender also plays a role in lack of access in Latin America. Because women are much more likely to be illiterate, “they have a much lower level

¹⁹² BUSCAGLIA JR. ET AL., *supra* note 123, at 31.

¹⁹³ *Id.* at 29.

¹⁹⁴ *Id.* at 31.

¹⁹⁵ Ratliff & Buscaglia, *supra* note 120, at 68.

¹⁹⁶ *Id.* at 69.

¹⁹⁷ Buscaglia & Dakolias, *supra* note 118, at 107.

¹⁹⁸ Dakolias, *supra* note 161, at 200.

¹⁹⁹ BUSCAGLIA JR. ET AL., *supra* note 123, at 35.

of knowledge about their legal rights and the judicial system.”²⁰⁰ For example, Peruvian women constitute seventy-three percent of the illiterate population.²⁰¹ And in Chile, a survey “found that 30.5 % of the women, as compared to 21.7 % of the men, did not know their legal rights.”²⁰² Coupled with the fact that domestic cases constitute over one-third of judicial caseloads throughout Latin America and the majority of clients of legal aid offices are women,²⁰³ this lack of legal knowledge results in severe disadvantages for Latin American women. In addition, at least one country has until recently “prevented spouses from bringing legal actions in courts.”²⁰⁴ Because of these disadvantages, many Latin American governments are establishing mediation programs for family cases. According to some scholars, however, “[a]lthough ADR may not be the ideal mechanism given the imbalance of power, it may be the only justice available to women.”²⁰⁵

Unfortunately, although mediation may permit parties to circumvent corrupt judicial systems, the judiciary may initially feel quite threatened by the existence of court mediation programs. For example, they may feel that these programs threaten their power and influence over the system, and may even be concerned that the program may divert possible opportunities for rent seeking. Nonetheless, some scholars posit that these judges may eventually “come to rely on [mediation administrators] for their skills as professional managers.”²⁰⁶ Lightened caseloads may also help alter these opinions. Finally, court mediation and the existence of mediation administrators may force judges to concentrate more on their important decision-making powers, and less on their more lucrative administrative duties.²⁰⁷ In other words, court mediation programs may encourage the judiciary to delegate administrative responsibilities.

²⁰⁰ Dakolias, *supra* note 161, at 213 (citing COMISIÓN PERMANENTE DE LOS DERECHOS DE LA MUJER Y DEL NIÑO, INFORME NACIONAL SOBRE LA MUJER 71-72 (1995)).

²⁰¹ *Id.* at 213 n.201

²⁰² *Id.* at 213.

²⁰³ *Id.* at 213-14.

²⁰⁴ *Id.* at 216 n.210.

²⁰⁵ *Id.* at 216.

²⁰⁶ BUSCAGLIA JR. ET AL., *supra* note 123, at 33.

²⁰⁷ *Id.* at 33.

2. Mediation as a Mechanism for Collaborative Dialogue

Shonholtz has defined democracy's underlying mission as "the creation of acceptable, fair, and neutral venues and forums for the peaceful expression of conflict."²⁰⁸ In a well functioning democracy, conflict between groups stimulates creative thought and encourages parties to find responsive and thoughtful resolutions. According to de Tocqueville, a properly functioning democratic society fosters the "delimitation of government prerogatives and [creates] a context for constraining arbitrary or intrusive state power."²⁰⁹ Conflict resolution is the natural vehicle for this properly functioning society, since the process of identifying and addressing conflict enables governments to understand the needs and desires of their citizens. Such understanding of the nuances to a conflict makes possible targeted governmental action to bring about needed social change. In a sense, "social change produces conflicts and conflicts bring about social change."²¹⁰

However, conflict can become destructive when governments fail to respond to changing needs of society, and when social and political "structures perpetrate social injustices against different sectors of the society."²¹¹ It is in societies in which conflict has traditionally been defined as violent or bad that conflict becomes something to be feared and avoided at all costs. In the context of societies currently transforming themselves from authoritarianism to more participatory forms of governance, "the zones of conflict" that societies encounter may actually increase.²¹² This is because in authoritarian societies conflict is stifled, and decisions are made by officials without systematic discussion and input from below. In contrast, in democratic societies, people are the instigators of change and may express their disagreement in nonviolent and official ways through dialogue, voting, and peaceful protest. For these reasons, societies in transition to democracies

²⁰⁸ Raymond Shonholtz, *The Mediating Future*, 552 ANNALS AM. ACAD. POL. & SOC. SCI. 139, 140 (1997).

²⁰⁹ Carlos L. Yordán, *Instituting Problem Solving Processes As a Means of Constructive Social Change*, 1.4 ONLINE J. PEACE & CONFLICT RESOL. 5, ¶ 10 (last visited Mar. 16, 1999), available at http://www.trinstitute.org/ojpcr/1_4yordan.htm (quoting Alexis de Tocqueville, cited in Andrew Levin, *Civil Society and Democratization in Haiti*, 9 EMORY INT'L L. REV. 389, 400 (1995))

²¹⁰ Yordán, *supra* note 209, ¶ 3.

²¹¹ *Id.* ¶ 2.

²¹² Robert C. Schehr & Dragan Milovanovic, *Conflict Mediation and the Postmodern: Chaos, Catastrophe, and Psychoanalytic Semiotics*, 26 SOC. JUST. 208, 225 (citing R. UNGER, FALSE NECESSITY (1987)), available at 1999 WL 25869925.

will actually experience greater opportunities for expressing their disagreement than before. This both increases the need for nonviolent and effective forums, and increases the risk of societal disintegration if these forums are not available.

In Latin America, the history of violent confrontation and authoritarianism has resulted in a scarcity of legitimate and non-threatening forums for the peaceful resolution of societal and individual conflicts. Although not all countries have been exposed to civil or external war, governmental corruption and private vigilantism throughout the region have resulted in an unofficial "war" between governments and their citizens. That is, deeply felt public mistrust of government and the inability of the judiciary to stem both governmental and private violence towards marginalized populations has brought about an environment of such hostility and danger that manifestations of further violence are increasingly common.

According to a Nicaragua group operating under the auspices of the International Commission of Support and Verification and the Organization of American States, transforming these societies into viable and peaceful environments requires a comprehensive, four-part approach to conflict resolution.²¹³ The group based these recommendations on the needs of post-war Latin American societies with established international peace missions. The four-part approach hinges on participation by marginalized groups for its success. First, "mediation, conflict resolution, human rights protection, and violence-deterrence" are needed to support and sustain the peace process, in part by strengthening state institutions and civil organizations.²¹⁴ Second, civil organizations and popular constituencies must participate individually and collectively in any conflict resolution process.²¹⁵ In other words, to be effective and sustainable, conflict resolution processes must be participatory at all levels of society, and not used exclusively by state officials.

Thirdly, "the local peasant communities [must] become participants in the peace process, not just objects."²¹⁶ However, in order for these communities to become true participants, attention must be paid to their organizational development. That is, local communities must be allowed and

²¹³ See MARES, *supra* note 1, n.42 (citing *Comisión Internacional de Apoyo y Verificación CIAV/OEA, in Proceso de Paz en Nicaragua: Verificación de Derechos Humanos, Resolución Pacífica de Conflictos y Construcción de la Paz*, MIMCO 25-26 (Aug. 1996)).

²¹⁴ *Id.*

²¹⁵ See *id.*

²¹⁶ *Id.*

encouraged to develop and strengthen their local governments in order for them to be effective participants. Without their effective participation, conflict resolution processes will not be able to "respond to the specific needs of the people in the most efficient, practical, and realistic manner."²¹⁷ Finally, peace should stimulate the growth of these peasant groups, and afford them an atmosphere conducive to the development of self-representation.²¹⁸

Thus, by utilizing mediation in this way, mediation can act as a unifying process by bringing disparate groups together to work collectively to establish peace in war torn societies. However, mediation is also integral to establishing and sustaining democratic forms of governments, regardless of whether that society is post-war or in a relatively peaceful transition to democracy. For instance, when discussing adopting mediation techniques in post-soviet Russia, a North American mediator stated that learning mediation techniques is "taking the first step toward democracy When you are resolving disputes, you are governing yourself."²¹⁹ Because democracy is founded on the fundamental idea of political negotiation through compromise and problem solving,²²⁰ it can be seen "as the development of the legitimacy of laws and the reasonableness of individuals" to understand that "several truths can exist simultaneously."²²¹

Mediation is ideally suited to helping parties understand these truths, since an effective mediation forces people to listen to one another and allows them to hear those thoughts and feelings through the neutral language of the mediator. Essentially, mediation enables people to develop constructive methods of communication,²²² so that even if no resolution is reached at the session, parties will hopefully internalize these constructive skills so that

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ *Around the World: Briefs*, 7 WORLD ARB. & MEDIATION REP. 130 (1996).

²²⁰ Eric Brazil, *S.F.'s Great Peacemaker Takes on Europe Community Boards Founder Teaches New Democracies how to Compromise*, S.F. EXAMINER, Jan. 27, 1992, at B3, available at 1992 WL 7608584 (founder Raymond Shonholtz states that "The deepest reality is that you can't run a democracy without negotiating."); see also Michael T. Kaufman et al., *Dissidents—Then and Now*, TRANSITION, Feb. 21, 1997 at 7, available at <http://ella.sirs.com>.

²²¹ Dusan Ondrusek & Vladimir Labath, *Conflicts in Transforming Society and the Nongovernmental Sector: The Slovak Example*, 552 ANNALS AM. ACAD. POL. & SOC. SCI. 40, 41 (1997) (positing that open dialog about these differing truths is necessary to the continuance of democracy).

²²² Azcarate, *supra* note 83.

future conflicts may be peacefully resolved. At the very least, participants will have heard the views and concerns of the other side, and will understand those concerns to an extent not realized previously.

In addition to the more familiar, individual-focused court mediation programs, an unofficial multiparty mediation process called interactive conflict resolution has been developed.²²³ The model uses a panel of scholars and practitioners to act as mediators and facilitators and provide substantive knowledge for the parties. This substantive knowledge encompasses dispute resolution theory, but is essentially based on the panelists' ability to "explain the origin and escalation of the conflict [in question] through comparison with other conflicts."²²⁴ Using academicians rather than the government officials circumvents the long-standing public mistrust of government, and provides participants with panelists they can hopefully respect. This is because Latin American academia has traditionally been an arena in which free expression and thought is encouraged, and where those at odds with the government have been accepted.

Similar to the four-part Nicaraguan approach, interactive conflict resolution relies on expanding the number of participants. For example, rather than negotiation only between official representatives of groups in a conflict, interactive conflict resolution encourages participation by influential representatives such as "scholars, politicians, army generals, ex-presidents, journalist[s], popular leaders and businessmen."²²⁵ The goal of interactive conflict resolution is to utilize this goodwill towards academics, and help parties learn to communicate effectively with each other "with the hope that this communication will produce deeper understanding, mutual recognition and respect and possible hypothetical solutions to the conflict."²²⁶ Essentially, like mediation, interactive conflict resolution aims to change the learned behaviors of "violence and prejudicial thinking" to "peaceful and cooperative thinking."²²⁷

²²³ *Id.*

²²⁴ *Id.* (citing Roger Fisher, in *PEACEMAKING IN INTERNATIONAL CONFLICTS: METHODS AND TECHNIQUES* 27 (Zartmann & Rasmussen eds. 1997)).

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ *Id.*

3. *Mediation as a Spur to Increase Public Confidence in the System*

As described in Section III.A, public mistrust in the judiciary and in government permeates every aspect of Latin American society. Any meaningful judicial reform must make acquiring and sustaining the public's trust a fundamental goal, or those reforms will eventually, and perhaps even spectacularly, fail. Implementation of effective court mediation programs may help the state attain this goal. According to Judge Wayne Brazil, a high-quality court mediation program "increases the public's confidence in and respect for our system of justice and, by giving the parties a service they really value, increases their sense of gratitude toward the government and their sense of connection to our society."²²⁸ This gratitude, in turn, helps the public accept "the legitimacy of having democratically developed norms govern relations within our country."²²⁹

Unofficial mediation can also encourage sustained judicial reform, but through indirect channels. According to Judge Helen Highton of the National Civil Court of Appeals of Argentina, "there is [in Argentina] no culture nor practice in favor of settlement, consensus and conciliation, so creating a frame in which to discourage litigation as the only way to resolve disputes, is relevant."²³⁰ Essentially, these mediations can work to encourage a more democratic and participatory society by teaching parties how to communicate with each other effectively. These societal changes can build a reservoir of citizens able to interact effectively and nonviolently. In turn, the citizens will be more able to effectively negotiate their conflicts, and correspondingly more able to understand and assert their legal rights to a fair and effective judicial system. This undercurrent of citizens well versed in conflict resolution and legally savvy regarding their political and legal rights will put pressure on both the judicial system and government, in general, to change to suit their now identified needs. In short, effective mediation programs can encourage democratic modes of communication, and enable parties to begin

²²⁸ Brazil, *supra* note 127, at 738 (arguing that a high-quality court mediation program with paid court mediators is the most effective model for courts).

²²⁹ *Id.*

²³⁰ Helen Highton, *Role of Dispute Resolution in Judicial Reform: North American Input in the National Mediation in Argentina*, in DISPUTE RESOLUTION ACROSS THE CONTINENTS: 22ND ANNUAL INTERNATIONAL CONFERENCE 217, 238 (James B. Boskey & Douglas M. McCabe eds., 1994).

to understand how to function efficiently in a democratic society. Essentially, mediation programs “prioritize consensus.”²³¹

B. *Description of Actual Mediation Programs in Place*

In 1993, the Inter-American Bar Association resolved to recommend to their national bar associations that mediation in family law disputes should be promoted and encouraged.²³² In addition, they proposed continuing legal education for judges and lawyers regarding family mediation.²³³ The Association noted that Argentina and Colombia had already established such programs, and stated that these processes were a “fundamental and irreplaceable pillar” of any judicial system.²³⁴ This section describes current and past mediation programs in Latin America. Unfortunately, information about these programs is difficult to obtain, and in many cases only brief references are available. For example, in 1995 Dakolias wrote that Chile had a “70 percent success rate for mediation proceedings,” yet specific information about these proceedings is unavailable.²³⁵ Similarly, Dakolias writes that the El Salvadorian Procuraduria settled a majority of mediated cases regarding child support and alimony in less than two months.²³⁶ However, no further information is available. Finally, many countries already possess the legal framework for mediation in their Codes of Civil Procedure, but have not yet established any mediation programs.²³⁷

Accordingly, this section concentrates on describing and analyzing mediation programs for which substantial information exists. Specifically, B.1 describes Capital University’s efforts in Nicaragua, in which the University co-sponsored experimental mediation programs and trained local mediators with country-specific training materials. Similarly B.2 discusses Argentina’s established and thriving court and community programs, while B.3 involves USAID-sponsored court mediation in Ecuador, and B.4

²³¹ Supreme Court of Ohio, Chief Justice Thomas J. Moyer, 1 ENCUESTRO INTERAMERICANO SOBRE RESOLUCIÓN ALTERNATIVA DE DISPUTAS 21 (1993).

²³² *The Inter-American Bar Association: Resolutions of the XXX Conference*, 25 U. MIAMI INTER-AM. L. REV. 161, 180 (1993).

²³³ *Id.*

²³⁴ *Id.*

²³⁵ Dakolias, *supra* note 161, at 200.

²³⁶ *Id.* at 202.

²³⁷ *Id.*

describes Colombia's National Conciliation Program, a process very similar to mediation.

In addition to pure mediation as we know it in North America, many Latin American countries have both informal and formal Justice of the Peace systems. These systems are in many aspects very similar to mediation. Section B.5 analyzes one of these systems in Peru, concluding that Justice of the Peace systems are an attractive adaptation of mediation that resonate with traditional practices in many Latin American countries. Finally, B.6 discusses Bolivia's seven hundred year-old tradition of "sponsorship," a form of interfamilial mediation.

1. *Nicaragua*

In 1993, Nicaraguan mediators mediated over four hundred disputes in a variety of settings, including "divorce and child custody, landlord/tenant, labor grievances, petty crimes and nuisance problems."²³⁸ The mediators were trained by the Center for Dispute Resolution at the Capital University Law and Graduate Center, and included "judges, attorneys, police officers, labor department officials, social workers, psychologists, teachers, pastors and priests."²³⁹ The training was the result of several trips by Capital personnel to meet with governmental officials, pastors and priests, police, courts and local bar, the Legal Office for Women, and a law school dean.²⁴⁰ Representatives from these groups worked jointly with Capital personnel to adapt "mediation training programs and materials to the Nicaraguan culture."²⁴¹ Although eventually over sixty mediators were trained by Capital personnel, initial offerings were limited to representatives from the above groups. In 1994, Capital co-sponsored a permanent mediation office with the law school at the National University of Nicaragua in Leon.²⁴² Employing a full-time director, the office "offers mediation trainings," and supervises over forty cases per month.²⁴³

²³⁸ Roberta S. Mitchell & Scott E. Dewhirst, *Designing Mediation Models and Training Programs Across Cultures*, in DISPUTE RESOLUTION ACROSS THE CONTINENTS, *supra* note 230.

²³⁹ *Id.*

²⁴⁰ *Id.*

²⁴¹ *Id.*

²⁴² *See id.*

²⁴³ *Id.*

2. Argentina

In Argentina, public opinion rated corruption as the second most pressing problem facing citizens in 1999.²⁴⁴ When implementing court annexed mediation in Argentina, a primary motivation was the perceived corruption “and a desire to put into place a new system for the resolution of conflict.”²⁴⁵ In 1991, a newly formed Mediation Commission from the Ministry of Justice was given the go-ahead to draw up a National Mediation Plan. This plan included “the creation of a mediator corps, a school for mediators, and a pilot scheme in civil law administration.”²⁴⁶ North American mediators were invited to Argentina to give mediation trainings, so that by 1992 Argentina had certified sixty mediators.²⁴⁷ Of the sixty mediators, ten were chosen in 1994 to establish a Mediation Center authorized in the civil law pilot scheme.²⁴⁸ This Center operates under ethical standards similar to those in place in North American mediation programs, and accepts cases referred either by the parties or by judges.²⁴⁹ Soon after the establishment of the Center, the Supreme Court of Argentina joined with the Ministry of Justice to implement mediation, and the project expanded to ten courts.²⁵⁰ Following the lead of many North American programs, the Center gave mediation training and education to those courts’ “[j]udges, court secretaries, and Juvenile Court advisers.”²⁵¹

In addition to these established court programs, the Center provides training courses for interior provinces, and “offers mediation internships in urban district centers.”²⁵² In 1994, the Center had a sixty-five percent settlement rate overall, with a seventy percent settlement rate in family and patrimonial cases.²⁵³ This is in spite of the fact that judges refer “the most difficult cases or those that have already been in the judicial system for five to eight years to the mediation center.”²⁵⁴

²⁴⁴ See Buscaglia & Dakolias, *supra* note 118, at 113.

²⁴⁵ Shonholtz, *supra* note 208, at 142.

²⁴⁶ See Alvarez, *supra* note 135, at 84.

²⁴⁷ *Id.*

²⁴⁸ *Id.* at 85.

²⁴⁹ *Id.*

²⁵⁰ *Id.*

²⁵¹ *Id.* at 86.

²⁵² *Id.* at 87.

²⁵³ Dakolias, *supra* note 161, at 202.

²⁵⁴ *Id.*

In 1995, Argentina statutorily established mandatory mediation.²⁵⁵ The statute requires that parties to mediation be represented by counsel, and keeps mediation proceedings confidential.²⁵⁶ For cases referred from a court, the mediator must have a law degree and be on a national register maintained by the Ministry of Justice.²⁵⁷ Specifically, cases referred from a judge must be mediated by lawyers with four years of seniority and certification as a mediator.²⁵⁸ Co-mediators in these cases must have a psychology or social work degree plus four years of experience.²⁵⁹ Finally, if parties settle, they are responsible for the mediator's fees, but if they do not settle, the "mediator's fee is paid out a special state fund."²⁶⁰ Because corruption in the judicial systems results in almost mandatory bribing of officials, although parties have a slight monetary reward for failure to settle, (*i.e.* mediator fees paid by the state) they are still better off financially if they settle and avoid endless delays and expenses of litigation.

In 1997, the legislature decided to give further impetus to parties to use mediation. A statute was enacted for federal and local courts in Buenos Aires City that allowed parties who paid settlements arising out of mediation or negotiation to forego paying the mandatory tax of three percent required if the party had paid after judicial resolution.²⁶¹ For example, if a court ordered Party B to pay Party A the equivalent of \$10,000 dollars as damages in a medical malpractice suit brought by Party A, Party A would be statutorily required to pay a three percent tax on the amount. Law 24,573 allows parties who have secured settlements in mediation to avoid paying this tax. However, if the court is required to enforce the settlement, the tax cannot be avoided.²⁶² In addition, the statute allows parties to negotiate without regard

²⁵⁵ Salvador J. Juncadella, *Relationships Between the Supreme Courts and the Lawyers Associations*, 42 ST. LOUIS U. L. J. 1089, 1093 (1998).

²⁵⁶ See Ethan S. Burger et al., *Making Mediation Work in Russia and Ukraine: The Need for an Appropriate Legal Framework*, 16 ALTERNATIVES TO THE HIGH COSTS OF LITIG. 171, 173 (1998).

²⁵⁷ *Id.*

²⁵⁸ See Gladys Stella Alvarez, *Court Connected Mediation Program and Argentine Judicial System—A Pilot Experience in Civil Justice*, in DISPUTE RESOLUTION ACROSS THE CONTINENTS, *supra* note 230, at 243.

²⁵⁹ See *id.*

²⁶⁰ Burger et al., *supra* note 256, at 174.

²⁶¹ See Emilio Ignacio Hardoy & Jorge O'Reilly, *Practitioners Perspective: Recent Regulations Reduce The Cost Of Litigation*, LATIN AM. L. & BUS. REP., July 31, 1997, available at 1997 WL 9499118.

²⁶² *Id.*

to legal precedent.²⁶³ Although insurance companies were dismayed, because of the possibility of avoiding the tax “[c]laims that seldom [are] brought to court because of the small amount” were, in 1997, “flooding mediation rooms.”²⁶⁴

Also in 1997, the Mediation Center expanded to include a Community Mediation Program in Buenos Aires, with the goal of “harmoniz[ing] neighborly coexistence, improv[ing the] quality of life, and creat[ing] a change in attitudes.”²⁶⁵ The Program is composed of sixteen centers and has thirty-two mediators hired by the city.²⁶⁶ As of 1999, the Program had handled nearly 1500 mediation requests, with 969 cases mediated and more than 600 resolved.²⁶⁷ The Program expanded into multiparty mediation, “in which groups of residents discuss solutions for neighborhood problems with institutions or businesses.”²⁶⁸ For example, one successful mediation involved garbage “accumulating at a site adjacent to the railroad track” in a residential neighborhood.²⁶⁹ The garbage collection company and a railroad service had denied full responsibility, but in a mediated settlement involving area residents and the companies, the garbage collection company and the railroad agreed to jointly clean and collect the waste.²⁷⁰ Finally, in addition to these efforts, mediators at the Program have begun teaching conflict resolution in primary and secondary schools. Their goal is to “reduce the level of violence, and strengthen democratic and participatory values.”²⁷¹

3. Ecuador

In 1999, USAID identified United State’s national interests in Ecuador as “the preservation of political stability and peace in the region,” and “the strengthening of democratic institutions in order to reduce threats to the

²⁶³ *Id.*

²⁶⁴ *Id.*

²⁶⁵ Marcela Valente, *Rights—Argentina: Mediation Resolves Neighborhood Conflicts*, INTER PRESS SERV., Sept. 15, 1999, available at 1999 WL 27374020.

²⁶⁶ *Id.*

²⁶⁷ *Id.*

²⁶⁸ *Id.*

²⁶⁹ *Id.*

²⁷⁰ *Id.*

²⁷¹ *Id.*

democratic process.”²⁷² Citing endemic corruption and a corresponding growing demand for “a more responsive and accountable government” from civil society organizations in Ecuador, USAID and the government of Ecuador launched an initiative in 1999 to provide court mediation to “fill the void created by ineffective government institutions.”²⁷³ Caseload concerns are also cited as instrumental in implementing these programs.²⁷⁴ In addition, private mediation for business concerns has been established, as well as “less formal, community-based approaches for conflict resolution with indigenous communities and other organizations working with the poor.”²⁷⁵

The World Bank also supports initiatives to provide legal services and mediation to underserved populations.²⁷⁶ Women’s legal service centers in Quito and Guayaquil offer legal aid, including mediation representation, as well as medical and psychological services.²⁷⁷ Center personnel include staff lawyers, psychologists, and medical assistants. Although data for mediation sessions is uncertain, the Quito program provided legal services to over 641 women in 2000, resulting in 100 new cases.²⁷⁸

In addition, recently established women’s centers in Duale and Santa Elena provide services to an average of thirty women per day in a population of 80,000 and 100,000 respectively.²⁷⁹ Each center staffs two lawyers, two psychologists, and two social workers, and fourteen mediators are shared between the centers.²⁸⁰ In addition to providing legal representation, the centers provide shelter, educate women on the laws, and draft and advocate for domestic violence statutes.²⁸¹ Training and prevention of domestic violence and violence in general is also offered to clients, families, religious groups, and students.²⁸²

²⁷² USAID, *USAID Congressional Presentation 1999: Ecuador*, available at <http://www.info.usaid.gov/pubs/cp99/lac/ec.htm> (last visited Nov. 17, 1999).

²⁷³ *Id.*; see also Jaime Espinoza Ramírez & Esteban Moreno, *Judicial Reform in Ecuador*, in JUDICIAL REFORM IN LATIN AMERICA AND THE CARIBBEAN 192 (Malcolm Rowat et al. eds.), World Bank Technical Paper No. 280 (1995).

²⁷⁴ USAID, *supra* note 272.

²⁷⁵ *Id.*

²⁷⁶ Dakolias, *supra* note 137, at S39.

²⁷⁷ *Id.* at S40.

²⁷⁸ *Id.*

²⁷⁹ *Id.* at S40–41.

²⁸⁰ *Id.* at S41.

²⁸¹ *Id.* at S42.

²⁸² *Id.*

4. Colombia's Conciliation Program

In Colombia, efforts to introduce mediation have resulted in Article 116 of the 1991 Colombian Constitution, which vests citizens with the power of administering justice on a temporary basis.²⁸³ Conciliation, as used in Colombia, is mediation as it is understood here in the United States. Colombia's system is three-tiered. The first tier consists of the administrative agencies of the Colombian Family Welfare Institute, which is authorized to conciliate family issues.²⁸⁴ The second tier is court conciliation by judges, before or during trial, while the third tier is comprised of private conciliation centers.²⁸⁵ As of 1993, Colombia had ninety-two private conciliation centers authorized by the Ministry of Justice.²⁸⁶ Each center is required to have one hundred members and be functional for two years.²⁸⁷ Four centers are located in universities and two in bar associations.²⁸⁸

Training for mediators is mandatory, and it is offered by the Ministry of Justice.²⁸⁹ In addition to general mediation and conflict settlement techniques, training sessions can include discussions on specific legal areas such as civil, labor, family, administrative, and criminal, as well as legal and administrative aspects of running a conciliation center.²⁹⁰ In addition to family matters (legal separations, child custody and visitation, and alimony issues), conciliation has been used in agricultural cases and contract disputes.²⁹¹ Radio advertising, flyers, and community presentations are used to promote the training.²⁹²

²⁸³ Dr. Sandro Verano, Director, National Conciliation Program, 1 ENCUESTRO INTERAMERICANO SOBRE RESOLUCIÓN ALTERNATIVA DE DISPUTAS 59 (1993).

²⁸⁴ *Id.*

²⁸⁵ *Id.*

²⁸⁶ *Id.*

²⁸⁷ *Id.* at 59–60.

²⁸⁸ Dr. Marta Eugenia Lescano, Coordinator of the Conciliation Program, Ministry of Justice, District of Antioquia, 1 ENCUESTRO INTERAMERICANO SOBRE RESOLUCIÓN ALTERNATIVA DE DISPUTAS 63 (1993).

²⁸⁹ Vevano, *supra* note 283, at 60.

²⁹⁰ Dr. Damaris Blandona Aristizaba, Regional Conciliation Coordinator of the El Valle and Cauca Departments, 1 ENCUESTRO INTERAMERICANO SOBRE RESOLUCIÓN ALTERNATIVA DE DISPUTAS 62 (1993).

²⁹¹ Verano, *supra* note 283, at 60.

²⁹² Aristizaba, *supra* note 290, at 62.

A pilot program in the beginning stages in 1993 established neighborhood centers in five cities.²⁹³ The pilot program has four stages. The first stage involves the training of mediators and is done through the means outlined above.²⁹⁴ The program establishes the centers in highly populated areas with low economic resources and poor access to the justice system,²⁹⁵ perhaps due to preliminary data from the private conciliation centers that found conciliation to be most successful in the poorer areas in terms of settlement rates and numbers of conciliations. For instance, neighborhoods like Guadalupe and Palmeras had a settlement rate of one hundred percent, while in high middle class neighborhoods "the lawyer reads the paper and does not conciliate."²⁹⁶ Finally, the program has an evaluation stage.²⁹⁷

5. Peru's Justice of the Peace System

Like many Latin American countries, Peru is a heterogeneous country with diverse ethnic groups such as Spanish, peasant, and indigenous communities.²⁹⁸ However, Peru's justice system is perceived as one that not only fails to recognize the distinct cultural and social realities of peasant and indigenous litigants, but also requires them to express themselves in Spanish even though many of them speak only rudimentary Spanish, if any at all.²⁹⁹ In addition to these fundamental concerns, endless delays and corruption have resulted in a public that views judges as unjust and immoral grafters.³⁰⁰

The Justice of the Peace system, established through Judicial Organic Law, Article 61, provides official justice for these peasant and indigenous groups. Every population center within Peru has at least one justice of the peace.³⁰¹ The system relies on local justices elected by their communities to supplement the broader program.³⁰² Although the position is non-

²⁹³ Verano, *supra* note 283, at 60–61.

²⁹⁴ *Id.* at 61.

²⁹⁵ *Id.*

²⁹⁶ Lescano, *supra* note 288, at 64.

²⁹⁷ Verano, *supra* note 283, at 60.

²⁹⁸ Brandt, *supra* note 15, at 92–93.

²⁹⁹ *Id.* at 93.

³⁰⁰ *Id.* In 1993, the Supreme Court alone had a backlog of 28,000 cases, with a county-wide backlog reaching horrific proportions of 250,000 to 500,000 civil and criminal cases. *Id.*

³⁰¹ *Id.*

³⁰² *Id.*

compensatory, serving is considered an honor.³⁰³ Seventy percent of the justices are not legally trained, but all are local residents and “generally [belong] to the same social class as the parties to a conflict”³⁰⁴ Similar to conciliators, they “often have little or no formal training in resolving disputes, and propose solutions until the parties agree on one.”³⁰⁵

Although the Justices are legally required to follow the law, many cases revolve around non-legal issues that do not rise to a cause of action in official courts.³⁰⁶ This occurs even though the justice officially has jurisdiction for only the following types of cases: “monies due and owing; support and alimony matters; urgent, temporary intervention with juveniles who committed antisocial acts; evictions; and injunctions governing personal property.”³⁰⁷ For example, couples often come before a justice of the peace for “jealousy or nonfulfillment of domestic obligations.”³⁰⁸ The justice is required by custom and tradition to listen to the two sides and come up with the solution based not only on law, but also on “the culture and customs of the locality.”³⁰⁹ Because the justice is not limited to legal claims, he or she can act more as a mediator to help the parties resolve underlying personal issues and begin “at the source of the conflict in order to promote a lasting social peace.”³¹⁰

Roughly forty-seven percent of all cases in Peru, with the exclusion of Lima, are handled by justices of the peace, with sixty-three percent of those litigants satisfied with actions taken by the justice.³¹¹ In addition to familiarity with language, litigant satisfaction is bolstered by simple procedures, low cost, accessibility, and the perception that the justice of the peace is honest and just. For traditional communities, membership of the justice in the community affords the community a measure of social control, since families and neighborhoods are more interconnected and closely knit than modern communities, in which people tend to move around with more frequency, and not know their neighbors.³¹² These traditional communities

³⁰³ *Id.*

³⁰⁴ *Id.* at 93–94.

³⁰⁵ *Id.*

³⁰⁶ *Id.* at 94.

³⁰⁷ *Id.* at 93.

³⁰⁸ *Id.* at 94.

³⁰⁹ *Id.* at 93.

³¹⁰ *Id.* at 94.

³¹¹ *Id.* at 95.

³¹² *Id.* at 95–96.

have higher rates of dispute settlement than more modern ones, perhaps due to the desire to use conciliation to maintain equilibrium in their complex social relationships.³¹³ (For more discussion on the ability of the traditional community to manage conflicts, see the introduction to Section II, *supra*.)

6. *Bolivia's Tradition of "Sponsorship"*

The Aymara culture in Bolivia supports a very old form of mediation called sponsorship, "in which the sponsor of a married couple clearly participates in the resolution of conflicts without imposing any position."³¹⁴ Similar to a mediator, the sponsor brings the family together so that they may listen and be heard and helps them resolve their problems.³¹⁵ Because Bolivia's urban communities are experiencing tremendous rural-urban migratory flow, current police and judicial systems are unable to adequately service the areas.³¹⁶ For example, while the city of El Alto has a population of 400,000, its police force consists of only 200 men.³¹⁷ Instead of allowing their communities to disintegrate due to these tremendously inadequate services, the largely traditional and formerly rural families are combating possible violence with the "sponsorship" tradition.

V. CONCLUSION

At the first inter-American meeting on alternative dispute resolution held in Buenos Aires in 1993, it was clear from the reports of the sixteen countries represented at the meeting that the movement for adoption of mediation is universal in its appeal. Where formal court programs are established, mediation offers access to the institutions of the justice system. Where ADR is manifested in neighborhood justice centers, as in Argentina, or conciliation centers, as established throughout Columbia, the goal of the activity is the same—providing citizens with a place and a process for the peaceful resolution of their disputes. All participants agreed that factors such as cost,

³¹³ See *id.*

³¹⁴ Gaston Mejia Brown, 1 ENCUESTO INTERAMERICANO SOBRE RESOLUCIÓN ALTERNATIVA DE DISPUTAS 65 (1993).

³¹⁵ See *id.*

³¹⁶ See *id.*

³¹⁷ See *id.*

timeliness, and level of satisfaction of the disputing parties were fundamental elements that drove the acceptance of mediation.³¹⁸

Whether the economy and political system of a North American, Central American, or South American country is robust and stable or depressed and volatile, the benefits of mediation are consistent. Many of the laws and programs are strikingly similar, yet some are uniquely Latin American, such as Bolivia's sponsorship tradition and the Justice of the Peace programs in Peru. Notwithstanding any differences, the perspectives of the Buenos Aires participants coalesced to produce goals and purposes that are inter-American. That would not be a profound conclusion if it were not such a dramatic contrast with the other conclusions of this article regarding the inefficiencies and abuses in most of the judicial systems in Latin America.

Every society that has adopted a democratic system of government has recognized that the stability of all democratic institutions rests upon a justice system founded on principles of equal access, impartiality, and independence. The Honorable Gladys Stella Alvarez of Argentina, a leading proponent of Argentina's mediation programs, speaks of mediation's "essentially democratic nature," and of its capacity to bring about a "paradigmatic social change" from litigation and violence to "pacification and cooperation."³¹⁹ The varieties of mediation processes discussed in this paper can directly affect the very serious problems of systemic corruption in the judicial system, violence, and an inability to communicate peacefully within society at large. For example, court mediation programs operated under the aegis of the judicial system can allow parties to circumvent corrupt practices and resolve their disputes in a timely and efficient manner.

Moreover, the intensity of interest and participation of citizens in their government is determined in large measure by the intensity of their trust for governmental institutions. The creation of that trust is particularly difficult in countries with a history of abuse of political power and disincentives for public participation in the resolution of important decisions. Mediation should be most attractive in those circumstances because it gives to the individual a measure of control over his or her own destiny.

³¹⁸ Chief Justice Thomas J. Moyer, Observations from notes taken as speaker and participant in the 1993 Conference (on file with authors).

³¹⁹ See Alvarez, *supra* note 135, at 79.

